IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1355

PENTHOUSE INTERNATIONAL, LTD., a corporation; ROBERT GUCCIONE; LOWELL BERGMAN; and JEFF GERTH,

Petitioners,

v.

RANCHO LA COSTA, INC., a Nevada corporation; LA COSTA LAND COMPANY, an Illinois corporation; LA COSTA MANAGEMENT COMPANY, a California corporation; LA COSTA COMMUNITY ANTENNA SYSTEM, INC., a California corporation; PARADISE HOMES, INC., a California corporation; MERV ADELSON and IRWIN MOLASKY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

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Petitioners, Penthouse International, Ltd., Robert Guccione, Lowell Bergman and Jeff Gerth, respectfully pray that a writ of certiorari issue to review the memorandum and notice of intended decision dated April 5, 1976, and the memorandum opinion and order, dated June 25, 1976 and filed July 12, 1976, of the Superior Court of the State of California for the County of Los Angeles, denying petitioners' motions for summary judgment in a libel action with respect to respondents Rancho La Costa, Inc., La

Costa Land Company, La Costa Management Company, La Costa Community Antenna System Inc., Paradise Homes, Inc., Merv Adelson and Irwin Molasky.

Opinions and Orders Below

The unreported memorandum opinion and order of the Superior Court of the State of California for the County of Los Angeles, dated and filed November 19, 1975, initially granting the motions of petitioners Lowell Bergman, Jeff Gerth and Penthouse International, Ltd., for partial summary judgment with respect to the respondents and the other plaintiffs on the ground that they were public figures and an inextricable part of the La Costa story, a matter of general or public interest, is set forth in Appendix A hereto.

The unreported memorandum and notice of intended decision of the Superior Court of the State of California for the County of Los Angeles, dated April 5, 1976, granting all of the petitioners' motions for summary judgment with respect to plaintiffs Allard Roen and M. B. Dalitz, but denying summary judgment as to public figure status with respect to the respondents, is set forth in Appendix B hereto.

The unreported subsequent order of the Superior Court of the State of California for the County of Los Angeles, dated June 25, 1976 and filed July 12, 1976, adhering to the April 5, 1976 memorandum and notice of intended decision, is set forth in Appendix C hereto.

The unreported order of the Court of Appeals, Second Appellate District, Division One, entered on December 10, 1976, denying a petition for a writ of mandate, is set forth in Appendix D hereto.

The unreported order of the Supreme Court of California, dated January 5, 1977, denying a petition for hearing, is set forth in Appendix E hereto.

Jurisdiction

The order of the Superior Court of the State of California for the County of Los Angeles dated June 25, 1976, adhering to that court's prior memorandum and notice of intended decision, was filed on July 12, 1976. On December 10, 1976, the Court of Appeals, Second Appellate District, Division One, denied a timely petition for a writ of mandate. Thereafter, on January 5, 1977, the Supreme Court of California, without rendering an opinion, denied a timely petition for a hearing and writ of mandate. The decision of the Superior Court denying summary judgment as to the respondents is therefore final as to the federal constitutional issues involved and is not subject to further review in any state court. This petition for certiorari was filed within 90 days of the date of the denial of the petition for a hearing by the Supreme Court of California.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) on the ground that the decision of the Superior Court of the State of California abridged the petitioners' rights of free speech and of the press and deprived them of rights without due process of law guaranteed to them by the First and Fourteenth Amendments to the United States Constitution.

A decision on the merits now in favor of the petitioners would terminate the litigation. On the other hand, a failure to review will leave unanswered important questions of freedom of the press, will leave intact a state court's conflicting and erroneous interpretation of the federal constitutional principles established in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), and reaffirmed in *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), and will relegate the press to operating within the shadows of severe civil sanctions which chill the unfettered exercise of First Amendment freedoms to investigate, uncover and report criminal activities and other public controversies. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

Questions Presented

1. Was the court below in error under the First Amendment because of its failure to find respondents public figures to whom an "actual malice" standard of proof applied since they enjoyed broad access to the media, were prominent in the affairs of society and had extensive voluntary involvement in a controversy concerning important public issues?

2. Was the court below in error in interpreting this Court's decision in *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976), as effecting a change in this Court's decision in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974), with respect to the public figure principle?

3. Was the court below in error under the First Amendment because of its failure to find that actual malice has not been established with respect to the respondents?

Constitutional Provisions Involved

The constitutional provisions involved are the First and Fourteenth Amendments, United States Constitution, Amendment I, Amendment XIV, § 1.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U.S. Const., amend. I.
>
> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

> deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Statement of the Case

The corporate petitioner, Penthouse International, Ltd., is the publisher of the internationally distributed Penthouse Magazine. The individual petitioners are Robert Guccione, editor and publisher of Penthouse International, Ltd., and Lowell Bergman and Jeff Gerth, investigative reporters with a primary interest in the area of organized crime.

The corporate respondents are the owners and/or operators of certain facilities located in Carlsbad, County of San Diego, California, namely: Rancho La Costa, Inc., owner of a hotel, spa and other recreational facilities; La Costa Land Company, owner of improved and unimproved real property; La Costa Management Company, manager and lessor of condominium units and homes; La Costa Community Antenna System, Inc., installer of CATV systems; and Paradise Homes, Inc. which performs construction work for residential housing. La Costa Management Company and Paradise Homes, Inc. were defunct prior to the publication of the Penthouse article. The individual respondents, Merv Adelson and Irwin Molasky are stockholders of the respondent corporations. Mr. Adelson is the president of Rancho La Costa, Inc.

The respondents and Allard Roen and M.B. Dalitz brought this action for libel based upon an article jointly authored by Lowell Bergman and Jeff Gerth which appeared in the March 1975 issue of Penthouse Magazine entitled "La Costa—the Hundred-Million-Dollar Resort with Criminal Clientele". They filed the complaint in this action on May 25, 1975, alleging that the text of the article, which dealt with the La Costa resort and its relationship

to the Teamsters Union, government and organized crime, maliciously defamed and disparaged them by imputing to each of them various specific statements relating to criminality and illegal operations. They also charged that the pictorial representations accompanying the article and the headnote above the article and on the cover were libelous *per se*. On May 27, 1975, shortly after the action was commenced, the respondents, together with Dalitz and Roen, held a press conference at which their spokesman Adelson announced the filing of a $540,000,000 libel suit against the petitioners for the article which was characterized as painting the plaintiffs as "gangsters" and involved with "unsavory events and people," ranging from Lucky Luciano to Watergate.

The answers of the petitioners* each denied that there had been any defamation, asserted that the allegedly libelous statements contained in the article were true and claimed privileges under the First Amendment of the Constitution of the United States and under Article I, Section 2 of the Constitution of the State of California and a conditional privilege under Section 47 of the California Civil Code.

On September 2, 1975, petitioners Penthouse, Gerth and Bergman filed a motion for partial summary judgment requesting the court below to declare that the actual malice standard set forth by the Supreme Court in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), apply under the constitutional defenses asserted by them and that each of the plaintiffs was a "public figure" or, alternatively, that under California law plaintiffs were so involved with matters of public interest that in any event the actual malice standard applied under the affirmative defense of conditional privilege.

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* The answer of petitioner Penthouse was filed June 25, 1975 and the answers of petitioners Gerth and Bergman on July 2, 1975. The answer of petitioner Guccione was filed December 30, 1975, the court below having decided for the first time on December 15, 1975 that adequate service of process nad been effected as to him.

On November 19, 1975 the motions of Penthouse, Gerth and Bergman were granted by the Honorable Thomas W. LeSage, who concluded that:

> "The evidence is overwhelming that the corporate plaintiff, La Costa,* and the individual plaintiffs are public figures, and that the La Costa story is a matter of general or public interest within the rules of *New York Times* v. *Sullivan*, 376 U. S. 254; *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130; and *Rosenbloom*, 403 U.S. 29; and the Court so finds." (Appendix A)

Asserting that the identity of the individual plaintiffs as the founders of La Costa, who financed the resort through the Teamsters Pension Fund, was clear from affirmations of the individual plaintiffs themselves and from documentation presented to the court below, Judge LeSage determined that "Measured by *Gertz*, the individual plaintiffs must be judged an inextricable part of the La Costa story, and thus public figures by the *Gertz* standard." He, moreover, opined that this case, "more than any other case brought to its attention, merits a positive reaffirmation of the constitutional right of freedom of the press." (Appendix A).

Thereafter, on December 5, 1975 the authors moved for final summary judgment dismissing the complaint on the ground, *inter alia*, that there was no triable issue of fact as to malice in the publication of the article. By motion filed on January 5, 1976, Guccione and Penthouse also moved for final summary judgment dismissing the complaint on the grounds, *inter alia*, that plaintiffs were "public figures" and that there was no malice in the publication of the article. All of the motions were supported by affidavits, books, depositions and other transcripts, articles, briefs, and papers lodged with the court below in connection with the earlier partial summary judgment motion

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* Although Judge LeSage referred to a single corporate plaintiff, he granted the motions as to *all* plaintiffs.

and by additional materials submitted by the authors on their motion for final summary judgment and submitted by Penthouse and Guccione for their companion motions.

On April 5, 1976, Judge LeSage issued a memorandum and notice of intended decision granting the motions for summary judgment with respect to plaintiffs Dalitz and Roen, holding that "plaintiffs Dalitz and Roen are clearly public figures under all of the authorities and said plaintiffs have failed to show malice." However, the court below denied the motions for summary judgment with respect to the respondents, merely stating that:

> "Triable issues arise under the *Firestone* case; also, the juxtaposition of the firearms and graphics accompanying the PENTHOUSE article is a factor in the Court's decision on this phase of the case." (Appendix B)

In the course of the decision, it was observed that:

> "The central theme of the authors is the alleged entente from time to time and from place to place between legal business and suspect funds, a theme of national concern since at least the days of the Kefauver Committee. . . .
>
> "Further, LA COSTA is a cultural and economic phenomenon of this society. As disclosed by evidence from both sides in this case, such a phenomenon attracts visitors, features personalities of the sports, entertainment and political worlds and inevitably provokes journalistic interest and comments, favorable and unfavorable. The constitutional right of freedom of the press would, indeed, be feeble if it should be precluded from fair comment and probing on such matters." (Appendix B)

The court below then stated that "the standards governing such comments have significantly changed from *Rosenbloom* to *Firestone* on the federal level, and remain to be authoritatively defined on the state level." While the court

below noted that "neither *Gertz* nor *Firestone* excludes the application of the public-figure principle to individuals whose achievements have attracted notoriety or general fame in the community", the opinion failed to mention that, in addition, neither *Gertz* nor *Firestone* excludes such application to private individuals "who have thrust themselves to the forefront of a particular public controversy in order to influence the resolution of the issues involved." (*Firestone*, 424 U.S. at 453; *Gertz*, 418 U.S. at 345).

The court below moreover opined that "summary judgment must be denied where triable issues of fact are presented on the issues of malice or public-figure standing", citing *Goldwater* v. *Ginzburg*, 414 F.2d 324 (2d Cir. 1969), and *Buckley* v. *Esquire, Inc.*, 344 F.Supp. 1133 (S.D.N.Y. 1972). These cases involved *only* the issue of malice since Goldwater was a public official and Buckley a public figure. The court below also mentioned a group of state and federal cases which stressed the latitude of press comment to include vehement, caustic and even sharp attacks on public officials and public figures, including rhetorical hyperbole, vigorous epithet and ridiculing depiction and caricature.

The effect of this decision was to reverse the earlier finding of the court below that the respondents were public figures at least for the limited purposes of the article, and to fail to make any determination as to whether or not the malice standard applied or had been met with respect to them.

The court below instructed counsel to file any objections to or concurrence with its intended rulings and indicated an interest in analysis and summary. The memoranda for all parties reflected a desire for clarification; however, by order dated June 25, 1976 and filed July 12, 1976, the court below adhered to its position as to summary judgment, stating:

> "The Court only adds that a necessary premise of the intended decision and this order is that there are

triable issues of fact with respect to whether or not all the plaintiffs (except Mr. Dalitz and Mr. Roen) are public figures." (Appendix C)

This petition for a writ of certiorari is addressed to the Superior Court of the State of California for the County of Los Angeles because both the appellate court and the highest state court have declined to review the Superior Court decision (Appendices D and E).

Reasons for Granting the Writ

We respectfully submit that a writ of certiorari should be granted to review the decision of the court below on the grounds that it has erroneously applied this Court's decision in *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), to deprive petitioners of important constitutional rights, forcing them to proceed to trial on erroneous theories of law, and precipitating unnecessary confusion as to the meaning and effect of the *Firestone* opinion. If the errors of the court below remain uncorrected, the petrifying effect of the decision will continue to intimidate the members of the press from freely performing their vital social functions of investigating, uncovering and reporting on criminal activities and other matters of clear public interest in violation of their First Amendment freedoms.

I.

The Court Below Erroneously Decided that Triable Issues of Fact Exist with Respect to Public Figure Status of the Respondents in Violation of Petitioners' Constitutional Rights.

The critical issue of whether or not the respondents have acquired the status of public figure for purposes of their libel action is a question of paramount constitutional significance which, if answered in the affirmative, will be dispositive of this case. The constitutional privilege framed by the seminal case of *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), and extended by later cases, prohibits a public figure from recovering damages for defamatory falsehood unless he proves by clear and convincing evidence that the statement was made with "actual malice". However, by declining to find respondents public figures as a matter of federal law, the court below has improperly subjected the petitioners to the risk of an adverse determination of this pivotal question and ultimate decision based upon negligence principles alone.

1. The court below abused its proper function by abstaining from a legal conclusion as to whether all plaintiffs were public figures. In vacating its earlier grant of partial summary judgment as to all plaintiffs but Dalitz and Roen, stating that the public figure question presents triable issues of fact, the court below radically departed from settled authority and case law. This Court clearly established the correct rule in *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966):

> "[I]t is for the trial judge in the first instance to determine whether the proofs show [plaintiff] to be a 'public official' [or a public figure]."

The court below had before it a record replete with relevant material to enable it to make this determination.*

2. The court below misconstrued the *Firestone* case, determining that it had changed the *Gertz* public figure doctrine. While the court below ruled the plaintiffs Dalitz

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* At least two district court opinions, relying on *Rosenblatt*, have found that while "the issue of whether a plaintiff in a defamation action is a public figure poses a mixed question of law and fact, it is nevertheless one for the Court, not the jury, to determine." *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 440, 444 (S.D. Ga. 1976); *Hotchner* v. *Castillo-Puche*, 404 F. Supp. 1041, 1045 (S.D.N.Y. 1975).

and Roen are "clearly public figures under all of the authorities, and said plaintiffs have failed to show malice," it incongruously declined to enter a similar order with respect to the respondents, merely stating that triable issues arise under *Firestone*. However, because there is no basis for differentiation among the plaintiffs with respect to their involvement with the La Costa resort (and none was offered by the court) and *Firestone* reaffirms the principles of *Gertz* earlier applied by the court below in granting partial summary judgment as to all the plaintiffs, there is an immediate need for clarification in order to rectify the erroneous, unfounded and constitutionally impermissible treatment of the public figure issue.

The *Firestone* decision expressly adopts the language of *Gertz* to describe that class of libel plaintiffs upon whom the actual malice burden should rest as:

> "a public officer or a public figure who might be assumed to 'have voluntarily exposed [himself] to increased risk of injury from defamatory falsehood' . . ." 424 U.S. at 456.

Whether a libel plaintiff may fairly be said to have assumed that risk is a function of his conduct in connection with a public issue such as entitles press comment to the constitutional privilege. The cases are harmonious on this point.

In *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967), a case specifically referred to in both *Firestone* and *Gertz,* Chief Justice Warren, in a concurring opinion adopted by a majority of this Court, reasoned that the importance of a person in the context of an issue of public concern was the proper determinant of whether the increased risk of defamation was warranted. In that connection he observed that there was no basis for distinguishing between "public figures" and "public officials" stating:

> "that although they are not subject to the restraints of the political process, 'public figures', like 'public officials', often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials'." 388 U.S. at 164.

Mr. Justice Harlan's opinion in *Butts* also focused upon a public figure's capacity to rebut criticism. He found that "Butts may have attained that status by position alone [as athletic director of the University of Georgia] and Walker by the purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." The key to Justice Harlan was that "both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' to the defamatory statements." 388 U.S. at 155.

This Court in *Gertz,* referring to Mr. Chief Justice Warren's opinion, stated that in the *Butts* case

> "[t]he Court extended the constitutional privilege announced in [*New York Times*] to protect defamatory criticism of non-public persons who 'are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" 418 U.S. at 336-37.

This Court then similarly acknowledged that, like public officials, a public figure "must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." That increased exposure is not unfairly imposed because "[p]ublic officials and public figures

usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." 418 U.S. at 344.

In *Gertz* a public figure was defined in the following manner:

> "For the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." 418 U.S. at 345.
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> ". . . [Public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions." 418 U.S. at 351.

This Court expressly recognized that in laying down "broad rules of general application," which "necessarily treat alike various cases involving differences as well as similarities . . . not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority." 418 U.S. at 343-44.

In *Gertz* and *Firestone* neither libel plaintiff met the test of a public figure for all purposes. This Court therefore considered the nature and extent of each plaintiff's conduct

in connection with the particular controversy giving rise to the alleged defamation and focused on the type of prominence of the libel plaintiff, the manner and degree of his involvement in the controversy, and the legitimacy of the public interest in the controversy.

In *Gertz* the alleged defamation charged Gertz with having been involved in a Communist plot to discredit the police. This Court found that Gertz, although he had achieved some local prominence as an attorney, had "played a minimal role" in the controversy giving rise to the defamation and his "participation related solely to his representation of a private client." He took "no part in the criminal prosecution" of the policeman, nor had he discussed either the criminal or civil litigation with the press. Although it was specifically held that the controversy was a matter of public interest, this Court found that Gertz "plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." 418 U.S. at 352.

In *Firestone,* the alleged defamation charged Mrs. Firestone with having been divorced for adultery. This Court found that Mrs. Firestone, although she may have attained some local prominence socially, and was intimately involved with the litigation which she instituted, was not involved in "the sort of 'public controversy' referred to in Gertz even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." In addition, the fact that Mrs. Firestone "was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony" did not constitute a voluntary participation in the controversy. 424 U.S. at 454.

In *Gertz,* therefore, although the controversy centered on a matter of legitimate public interest, Gertz lacked the requisite intimate involvement with the controversy. In *Firestone,* although Mrs. Firestone was intimately involved

with the controversy, her involvement was not voluntary and the controversy in any event was not a public issue.

Mr. Justice Powell in his concurring opinion in *Firestone* took pains to indicate that "[a] clear majority of the court adheres to the principles of *Gertz.*" 424 U.S. at 464. Further, in *Firestone,* while declining to grant the press a blanket privilege for *all* reports of judicial proceedings, this Court specifically advised that "participants in some litigation may be legitimate 'public figures', either generally or for the limited purpose of that litigation," and as to them, the *Gertz* test was applicable. This Court reaffirmed that the *Gertz* test, which eschewed a subject matter test for one focusing upon the character of the defamation plaintiff,

> "provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault." 424 U.S. at 457.

The court below, however, contrary to the language of the *Firestone* opinion, inexplicably read *Firestone* as departing from the rulings of *Gertz* to such a radical extent that it was compelled to reverse its earlier determination. By its earlier decision, the court below correctly found that the respondents were public figures under *Gertz* as a matter of law, at least for the limited purposes of the La Costa controversy—a matter of public interest—based upon their "inextricable" involvement with the La Costa resort which they admittedly founded and control. The court's subsequent abandonment of that finding cannot be explained by the intervening decision in *Firestone.*

The decisions which have followed in the wake of *Firestone* have rejected the suggestion or implication that anything in *Firestone* erodes the principles adopted in *Gertz.* To the contrary, the courts since *Firestone* have consistently applied the guidelines set forth in *Gertz.* See *Anderson* v. *Stanco Sports Library, Inc.,* 542 F.2d 638, 640

n.4 (4th Cir. 1976); *Trans World Accounts, Inc.* v. *Associated Press,* No. C-75-1166, n.4 (N.D. Cal., filed January 31, 1977); *Martin Marietta Corp.* v. *Evening Star Newspaper* Co., 417 F.Supp. 947, 957 (D.D.C. 1976); *Rosanova* v. *Playboy Enterprises, Inc.,* 411 F.Supp. 440, 444 (S.D. Ga. 1976).

All of these guidelines—broad press access, especial prominence in the affairs of society and extensive voluntary involvement in a controversy concerning important public issues by all of the respondents—were indisputably demonstrated to the court below. The court below had before it several factors highly probative of the respondents' access to the media and their ability to influence public issues. One was the testimony of Adelson, spokesman for the plaintiffs, which contained an admission of important contacts with public figures and public officials. Adelson said:

> "Now you know, in living the kind of lives that we have lived and being around the hotel business for many, many years we've met all kinds of people . . .
>
> "We've met Senators and Governors and judges and whatever. We met everyone by name and are introduced to them . . . We have a lot of friends and our circle of acquaintanceship is much larger than the ordinary person who is not exposed to that kind of thing . . . " (Tr. pp. 10-11).

The court was also mindful of the press conference which had been held by the respondents and Dalitz and Roen on May 27, 1975 announcing to the public their libel action through newspaper, radio and television. Present were representatives from the *Los Angeles Sun,* the *Los Angeles Times, Variety,* and KFWB, KNBC, KNXT and the Associated Press. Six radio stations, five television stations and at least 120 newspaper reports in 23 different states carried the story of the plaintiffs' libel suit against Penthouse, Guccione and the two authors. In addition, the court below had the extensive press clipping files kept by all the plaintiffs and other media items amassed

by the petitioners concerning the respondents, as well as Dalitz and Roen.

The court below also had before it ample evidence that the respondents had thrust themselves to the forefront of public controversies surrounding them, jointly and severally, and invited public scrutiny in many ways. For example, to finance the first DRAM venture together, the Sunrise Hospital, Adelson and Molasky sought out the Teamsters Pension Fund loans (Adelson Tr. 757-8) and thereby evoked a storm of national criticism of such intensity that they were required to mount a public relations campaign to counter it (Adelson Tr. 58). Obstinately persisting in this involvement they invited continued adverse comment by again choosing the scandal-ridden Pension Fund as the source of a series of loans for La Costa totalling $60,000,000 and again inducing the sustained national adverse reaction. "I think that in most cases La Costa received unfavorable publicity because of its borrowings from the Pension Fund" (Adelson Tr. 1117-8).

The court below was moreover apprised that the respondents had attracted and invited public attention by the lavish nature of the La Costa resort they owned, which they widely publicized through five public relations agencies, a quarter-million dollar annual publicity budget, nationally televised sports tournaments and by associating themselves through free Presidential Memberships with well known personalities, inducing publicity in which Adelson and La Costa are prominently featured. Having fostered a profit-making enterprise featuring a star-studded clientele, they assumed the risk of press comment upon their notorious guests and associations as well.

Among the individual respondents, Adelson and Molasky, who have no criminal records, have most pointedly assumed the risk of adverse comment by and upon their continuing intimate business and personal involvements with confessed criminals Dalitz and Roen. By their sedulous refusals, in the face of 20 years of withering criticism in the

press, books, other media and by law enforcement agencies, to disassociate themselves from these persons, they have voluntarily thrust themselves into the forefront of the controversies surrounding Dalitz and Roen as allies vouching for their colleagues. Indeed, over two decades of inextricable business involvement as equal partners in no less than 27 entities with net assets of over $100,000,000, it was Adelson who persisted in bringing each and every such investment opportunity to Dalitz and Roen (Adelson Tr. 886).

It was Adelson and Molasky's same stubborn adherence to their involvement with Dalitz and Roen which reaped the whirlwind of obloquy so great that it tainted their contributions to Mayor Bradley's campaign and required that they be returned.

Adelson was asked during his deposition:

> "Q. Have you ever thought of disassociating yourself from Mr. Dalitz? A. No.
>
> Q. Have you ever thought of ceasing to do business with him because he had so often been characterized as an underworld figure? A. . . . I repeat, I know what Mr. Dalitz is, I have been associated with him for more than 20 years . . ., I know the facts.
>
> Q. Have you ever discussed with any of your other partners, Mr. Roen or Mr. Molasky, whether it would not best serve your reputation to disassociate yourselves from Mr. Dalitz? A. No." (Adelson Tr. 1112-3).

Upon nearly identical facts of associations with the Teamsters and underworld figures and attendant publicity, the first federal post-*Firestone* libel case granted summary judgment dismissing the action, holding plaintiff to be a public figure despite the absence of any criminal convictions. *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D.Ga. 1976).

Similarly, in *Martin Marietta Corp.* v. *The Evening Star Newspaper Company*, 417 F. Supp. 947 (D. D. C. 1976), a

libel action by a corporation for publication of a newspaper story that Defense Department personnel had been entertained at a hunting lodge leased by the plaintiff and that two prostitutes attended the party and one was paid $3,000 for her services by a Martin Marietta representative, the plaintiff urged that it had "refused to thrust itself into this controversy. . . ." The court, however, granted the defendants' motion for summary judgment and specifically found the plaintiff to be a public figure for the range of issues involved in the challenged article because of its access to the media and its voluntary association with such issues.

Rosanova and *Martin Marietta* confirm that the decision in *Firestone* is entirely compatible with the guidelines articulated in *Gertz* and underscore the total propriety of the original determination of the court below that the La Costa story is one of general public interest or concern and that all of the respondents are prominent in connection with that story. By their voluntary associations with the subject matter of the Penthouse article, they have assumed the risk of comment thereon and are thus public figures. Adelson is Chairman of the Board and a shareholder in all of the plaintiff corporations and Dalitz, Roen and Molasky are their directors and shareholders. All four are co-founders and owners. They have the power to set the standards and policies of the La Costa resort and control its clientele.

Rosanova and *Martin Marietta,* moreover, demonstrate that the construction of *Firestone* by the court below which led it to change its prior holding that all of the plaintiffs are public figures under *Gertz,* warrants review by this Court to rectify a state court error of constitutional magnitude, to dispel the confusion which now shrouds the press and to reinstate the constitutional imperatives of uninhibited, robust and wide-open debate about crime and related matters of public concern.

3. The court below apparently distinguished among the plaintiffs on a constitutionally impermissible basis. No basis for the differentiation was stated. In attempting to comprehend the different public figure treatment accorded Dalitz and Roen and the respondents, who were identically involved in the subject matter of the controversy, it appears that the only factor separating the former from the latter is admitted criminal involvement. No constitutionally permissible distinction can be drawn on this basis, for to do so is to impose upon the press the very burden of proving the truth of accusations which the "actual malice" standard was designed to avoid. As this Court observed in *Gertz:*

> "Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in New York Times Co. v. Sullivan, supra, at 279 . . . 'Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.' The First Amendment requires that we protect some falsehood in order to protect speech that matters." 418 U.S. at 340-41.

Neither for the determination of malice *nor* for the initial determination of public figure status is truth the criterion. In *Rosanova,* the plaintiff alleged he had been libeled as a "mobster". However, the court held him to be a public figure because of his voluntary contacts and involvements with organized crime, the subject of the challenged *Playboy* article. The court expressly found that although Rosanova had been the subject of governmental investigations and criminal prosecutions, he had never been convicted of any crime. The court stated, however, that "At the present stage, it is not a question of

truth of the alleged falsehood," and granted summary judgment dismissing the complaint. 411 F. Supp. at 446.

While the general public figure test does not require as a premise for notoriety actual criminal conviction, the more limited test does not depend on notoriety at all. It turns on the nature and extent of one's involvements and contacts in the controversy giving rise to the defamation. As stated in *Martin Marietta,* 417 F. Supp. at 957 n. 8, "*Gertz* does not require a public figure for limited issues to be notorious, but merely to be in a position allowing him to influence the resolution of the issue." Obviously then the limited test does not require conviction of a crime in order for the constitutional privilege to obtain permitting mention of the plaintiffs as involved through La Costa with "mobsters" or "underworld figures."

The respondents have had a voluntary, intimate, prolonged and extensive involvement with the La Costa resort. Moreover, they have invited comment upon their various public activities and associations. As these were among the subjects of the Penthouse article, the comment therein was as much constitutionally protected as it was with respect to the admittedly criminal plaintiffs, since all were similarly in a position to influence the resolution of the issues.

4. The court below erroneously held that triable issues arose by virtue of the juxtaposition of the firearms and graphics accompanying the article. Although the court below seems to have viewed the graphics as relevant to determining the public figure status of the respondents, it is clear that such items bear no relation to fame or notoriety, prominence, press access, influencing the resolution of the issues, assumption of the risk of adverse comment or voluntary exposure. They do relate to the legitimate public issues aired in the article. They might also be relevant to a determination of defamation or malice, but did not serve to defeat the motions for summary judgment against

Dalitz and Roen and should similarly pose no bar to granting summary judgment against the respondents.

The illustrations accompanying the article were not complained of as libelous when viewed in connection with its text, but standing alone, as libelous *per se* of all of the plaintiffs. No picture appears on the cover of the magazine illustrating the article, merely the words "La Costa—Syndicate in the Sun" along with other titles. The main graphic comprises two pages and is a melange of concepts, virtually unintelligible unless viewed in the context of the article.

None of the individual respondents claims that the male figures contained in the illustration represents his likeness nor do they claim that the hands on the revolvers belong to any of them. The law concerning graphics is the same as that which relates to prose or other modes of expression (Calif. Civil Code § 345). *Arno* v. *Stewart,* 245 Cal.2d 955 (1966); *Blake* v. *Hearst Pubs.,* 75 Cal. App.2d 6, 9-10 (1946). Thus, even if the graphics, alone or in context, were susceptible of some defamatory meaning, the respondents were required to show that the libelous material applied to them in particular and not merely to the general class of persons associated with La Costa, either as owners, operators or guests.

Further, the respondents had to adduce "clear and convincing evidence" of malice concerning them in order to defeat the motions for sumary judgment. This Court has held that malice cannot be inferred from the "language" of the defamation itself and that to do so is "error of constitutional magnitude", *Greenbelt Coop. Pub. Assoc.* v. *Bresler,* 398 U.S. 6, 10 (1970); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 288 (1964).

Before reaching the question of malice, the court below should have first determined whether the illustrations were defamatory at all. Where, as here, graphics say nothing in and of themselves, they must be read in connection with

the text they illustrate to determine whether, as a whole, they are susceptible of a defamatory meaning. *Washington Post Co.* v. *Chaloner*, 250 U.S. 290, 293 (1919). *Accord, Arno* v. *Stewart*, 245 Cal.2d at 959-60; *Blake* v. *Hearst Publications*, 75 Cal. App.2d at 9.

Respondents must also surmount a constitutionally imposed barrier which permits the press, in reporting on matters of public concern, to indulge in vigorous epithets and hyperbole to express its views without their being deemed libelous. Thus, the gun as a hyperbolic expression for political or financial power or the figure as a symbol for crime no more charges any plaintiff with a criminal act than the use of the term "blackmail" in an article with a column headed "Blackmail" which also charged a plaintiff with "unethical trade" and "skulduggery" in *Greenbelt Coop. Pub. Assoc.* v. *Bresler*, 390 U.S. at 18.

Although the court below cited the *Bresler* case and three others dealing with the latitude granted the press to make comments,* it still did not recognize that the only

* Summary judgment was granted in *Thuma* v. *Hearst Corporation*, 340 F.Supp. 867 (D. Md. 1972), where the court held that a description of a shooting as "cold-blooded murder," quoted in the allegedly defamatory newspaper accounts, was clearly hyperbole vehemently expressing the notion that the shooting was unjustified and unnecessary, and could not reasonably be regarded as meaning premeditated murder.

And in *Time, Inc.* v. *Johnston*, 448 F.2d 378 (4th Cir. 1971), the word "destroyed" quoted from Bill Russell's basketball coach to describe the devastating psychological effect of Russell's basketball ability upon the plaintiff was not susceptible of a literal reading and therefore, as a matter of law, not capable of defamatory meaning.

In *Yorty* v. *Chandler*, 13 Cal. App.3d 467, 471-72 (1970), the court held that a challenged cartoon which depicted Mayor Yorty in the company of four beckoning medical orderlies with grim expressions, one of whom concealed a straightjacket behind his back, was protected commentary on the mayor's political ambitions, observing: "To say so much with so little, the political cartoonist makes extensive use of symbolism, caricature, exaggeration, extravagance, fancy, and make believe".

issues the graphics raised were as to defamation or malice. Since no defamatory meaning can reasonably be discerned from the graphics nor have the respondents demonstrated malice in this respect, the mere presence of symbolic illustrations should have posed no bar to the granting of summary judgment.

II.

The Court Below Erroneously Failed to Apply a Malice Standard of Proof Under the First Amendment and Thus Erroneously Failed to Find that Actual Malice Had Not Been Established with Respect to the Respondents as a Matter of Law.

The decision of the court below is constitutionally infirm for implying that triable questions of fact prevent the conclusion that there has been no showing of actual malice as a matter of law under applicable federal principles. The errors committed by the court below in misconstruing *Firestone* were thus compounded by that court's failure to squarely address the malice issue. The respondents have utterly failed to satisfy the heavy constitutional burden of demonstrating that the alleged defamations were the product of actual malice.

The first definition of the actual malice standard was provided in *New York Times* itself:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

The rule was extended in *Butts* to apply to "public figures":

> "We consider and would hold that a 'public figure' who is not a public official may also recover damages

> for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a show ing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers". 388 U.S. at 155.

To discharge this burden, it is incumbent upon a plaintiff to adduce evidence sufficient to show that statements were published with a "high degree of awareness of their probable falsity" tantamount to a "calculated falsehood." *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1964).

In *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968), this Court declared:

> "Mr. Justice Harlan's opinion in Curtis Publishing Co. v. Butts, 338 U.S. 130, 153 . . . , stated that evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery . . . in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

The quantum of proof neecssary to sustain this burden must attain the maseure of "convincing clarity which the constitutional standard demands . . . [A lesser showing] would not constitutionally sustain [a libel] judgment . . . under the proper rule of law". *New York Times Co.* v. *Sullivan,* 376 U.S. at 285-86.

Here, the respondents utterly failed to satisfy their burden of proving the petitioner's awareness of the falsity

of the allegedly defamatory material "with convincing clarity" in order to prevent summary judgment from being entered. The court below had before it the deposition of the President of La Costa, respondent Adelson, who was spokesman for the entire group, in which he admitted that the respondents did not possess any facts or evidence in any sense adequate to meet the high constitutionally imposed standard of proof necessary to sustain a claim of actual malice.

The court below was also aware that the authors had made an extensive 18-month investigation as the basis for their article. This investigation was detailed, thorough, responsible, nationwide in scope and relied for its principal sources upon the most reputable law enforcement agencies, organs of the press and knowledgeable authorities. That investigation was, in turn, examined by the magazine's editors and its attorney who were satisfied with its thoroughness and with the responsibility of the statements made by the authors and relied on them for accuracy.

This Court stated in *St. Amant* v. *Thompson,* 390 U.S. at 733, that "[f]ailure to investigate does not in itself establish bad faith". If the negligible investigation performed in the *St. Amant* case was not constitutionally adequate to sustain a claim of "actual malice", it follows *a fortiori* that the very intensive and detailed investigation conducted by the authors in the instant case and the verification of this research by the publisher who had no reason to suspect the accuracy of the authors, is more than ample to defeat the unsupported contention of "actual malice."

The proof presented by the respondents and plaintiffs Dalitz and Roen to establish malice was a statement of the San Diego Sheriff that criminal activity did not exist at La Costa, which statement the authors investigated and discredited, a general statement by the Attorney General of California concerning his lack of knowledge of certain investigations at La Costa, and the affidavit of Professor

Robert Blakey who by his own averments disqualified himself from opining, either as an expert on crime or as a journalist, on the state of mind of the authors and publishers of the article.

The court below already determined on the basis of this record, which involves the same proof for each plaintiff, that two of them, Dalitz and Roen, failed to show malice. There being no sufficient evidence of actual malice, which is the proper constitutional standard to be applied in this case to any of the plaintiffs, the court below should have granted summary judgment with respect to the respondents as well.

Conclusion

In reversing its prior determination based upon *Gertz*, the court below has distorted the parameters of this Court's decision in *Firestone* which was not intended to undercut the constitutional principles articulated in *Gertz*. As a direct result, the decision of the court below at once deprives petitioners of constitutional protections and dampens the vigor with which the press seeks to penetrate the sealed doors of the criminal fraternity.

For the reasons stated, the petition should be granted.

Respectfully submitted,

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of Counsel

Dated: April 1, 1977

APPENDIX A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ORIGINAL FILED
Nov 19 1975
CLARENCE E. GABELL, County Clerk
Deputy

No. C 124 901

RANCHO LA COSTA, INC., a Nevada corporation, et al.,
Plaintiffs,

vs.

PENTHOUSE INTERNATIONAL, LTD., a corporation, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

The *Penthouse* article (March 1975) under consideration is entitled *"La Costa"*—"The Hundred-Million-Dollar Resort with Criminal Clientele."

The individual plaintiffs, Moe Dalitz, Allard Roen, Merv Adelson and Irwin Molasky (using the acronym DRAM), are said to have "founded" and "controlled" La Costa. The article describes loans from the Teamsters' Central State Fund and loans from the United States National Bank used to develop La Costa to national prominence.

The central theme of the article is the corporate plaintiff, La Costa, and the individual plaintiffs are among the many mentioned in connection with the history and promotion of La Costa.

Appendix A.

Traditional, even conservative, journals on the American publishing scene have commented of La Costa and DRAM:

> "The most dazzling monument to this bond between the Teamsters and organized crime is Rancho La Costa, a $100 million residential country club and health spa north of San Diego. . . . La Costa is financed in part by a $57 million loan from the Teamsters' Central States pension fund.
>
> "La Costa is controlled by four men, including Morris (Moe) Dalitz, a gambler and one-time bootlegger who holds a position of prominence in organized crime, and Allard Roen, who pleaded guilty to conspiracy to defraud thirteen years ago in a $5 million stock swindle." (Newsweek, August 18, 1975.)

And *Forbes,* in its article of August 15, 1975, entitled "Crime in the Suites" states:

> "Moe Dalitz was kingpin of the notorious Cleveland 'Purple Gang.' He made his money in racketeering, later bootlegging. Nowadays it's resort hotels. Dalitz, Allard Roen, Merv Adelson and Irwin Molasky (the DRAM group) today control the plush 5,600-acre La Costa resort complex located 30 miles south of the former Western White House. La Costa was financed in part by the Teamsters Union Central States Pension Fund. Additional financing was provided by Smith's bank, which in turn had about $20 million worth of Teamster deposits. The deposits were solicited by Senior Vice President Lew Lipton, a former restauranteur with underworld ties.
>
> "Loans to Rancho La Costa Inc. eventually appeared on the FIDIC's list of loans carried on the USNB books without adequate credit information. The guarantors were Dalitz, Doen and Molasky. According to reliable sources, the loans were roll-overs of $1-million credits involving 'finders' fees to a La Costa principal."

Appendix A.

The *New York Times* editorialized in its October 13, 1975 issue that:

> "La Costa itself is emblematic of the ties that have long made law-enforcement officials worry about the links between the teamsters and organized crime. Much of the resort's financing comes from the $1.4-billion Teamsters' Central States pension fund, and underworld figures are prominent among its owners and habitués. . . ."

(The documentation before the Court establishes many other similar comments.)

The evidence is overwhelming that the corporate plaintiff, La Costa, and the individual plaintiffs are public figures, and that the La Costa story is a matter of general or public interest within the rules of *New York Times* v. *Sullivan,* 376 U.S. 254; *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130; and *Rosenbloom,* 403 U.S. 29; and the Court so finds.

The identity of the individual plaintiffs and La Costa is clear from the documentation before the Court and is also affirmed by the declarations of the individual plaintiffs as well as, for example, Mr. Merv Adelson in his declaration in opposition to the motion affirms that he is president of the corporate plaintiff; that in the early 1960s he and Allard Roen, Irwin Molasky and Moe Dalitz purchased the La Costa acreage as an investment, ultimately assembling a total of about six thousand acres. Mr. Adelson outlines how he and his associates planned and developed La Costa and financed it through the Teamsters' pension fund and the United States National Bank of San Diego loans, loans which are, or were, being fully repaid. Mr. Adelson summarizes in his declaration, "I have related the true origin of La Costa, which was conceived by Irwin Molasky, Allard Roen and myself . . ."

In *Gertz* v. *Welch,* 418 U.S. 323, the United States Supreme Court was concerned with the defamation of a pri-

vate but prominent Chicago attorney who had participated honorably for years in community cultural, civic and legal affairs. In considering the application of the *New York Times* rule, the Court held with respect to the plaintiff, Gertz, "It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (418 U.S. 352.)

Measured by *Gertz,* the individual plaintiffs must be judged an inextricable part of the La Costa story, and thus public figures by the *Gertz* standard.

The Court adds that the case before the Court, more than any other case brought to its attention, merits a positive reaffirmation of the constitutional right of freedom of the press. The case before the Court is more compelling than the *New York Times* case, which involved the press' treatment of a police commissioner in connection with a civil rights demonstration; or the *Butts* case, which involved the *Saturday Evening Post's* article on the charge that Coach Wally Butts, of the University of Georgia, had conspired to fix a football game; or the *Rosenbloom* case, where a radio station was challenged for its coverage of the arrest of the distributor of a nudist magazine.

Therefore, upon consideration of the documentation before the Court, the briefs and the oral argument, the Court grants defendants' motion. Counsel for defendants to prepare and serve proposed attorney order.

DATED: November 19, 1975.

THOMAS W. LESAGE
Judge of the Superior Court

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ORIGINAL FILED

Apr-5 1976

John J. Corcoran, Acting County Clerk
J. R. Piper, Deputy

No. C 124,901

RANCHO LA COSTA, INC., a Nevada corporation, et al.,

Plaintiffs,

vs.

PENTHOUSE INTERNATIONAL, LTD., a corporation, et al.,

Defendants.

MEMORANDUM AND NOTICE OF INTENDED DECISION

A review of the law in this case begins with *New York Times* and ends with *Time Inc.* v. *Firestone.*

In *New York Times* v. *Sullivan* (1964), 376 U.S. 254 11 L.Ed.2d 686, the United States Supreme Court considered the limitations upon state libel laws imposed by the constitutional guarantee of freedom of speech and of the press. *New York Times* held in a civil libel action by a public official against a newspaper that those guarantees require clear and convincing proof that a defamatory falsehood alleged as libel was published with "knowledge that it was false or with reckless disregard of whether it was false or not." (11 L.Ed.2d 706.)

The same requirement was later held to apply to "public figures" who sued in libel on the basis of alleged defamatory falsehoods. *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 18 L.Ed.2d 1094.

In the application of the *Times* and *Curtis* principles, subsidiary rules were from time to time announced. *New York Times* itself specified that the burden is on the plaintiff to show malice with "convincing clarity" (285-286). Further in *Times* the court specified the need to make an individual examination of the whole record so that "the judgment does not constitute a forbidden intrusion on the field of free expression" (285). *Time* further stated that mere negligence on the part of the publisher is insufficient to show malice (288).

The most significant application of the *Time-Curtis* rule was reached in *Rosenbloom* v. *Metromedia,* 403 U.S. 29. In *Rosenbloom* the plurality of the court ruled that the New York Times "knowing or reckless falsity standard" applied in a state civil libel action brought not by a "public official" or a "public figure" but by a private individual for a defamatory falsehood published in a news broadcast by a radio station about the individual's involvement in an event of "public or general concern" or "interest."

In *Gertz* v. *Walsh,* 418 U.S. 323, the court retreated from *Rosenbloom,* holding "Absent clear evidence of *general fame* or *notoriety* in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (41 L.Ed.2d 812)

Justice Powell in *Gertz* further theorized with respect to *New York Times* and *Curtis* as follows: "The New York Times standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the *notoriety* of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the dafamtory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander." (41 L.Ed.2d 806).

Finally, in *Time Inc.* v. *Firestone,* a current majority of the United States Supreme Court (further reflecting an ambivalent mood to freedom of the press) denied "public figure" status to the plaintiff Mary Firestone, who the court said did not assume any role of a special prominence in the affairs of society other than perhaps Palm Beach society nor did she thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it. The court declined to extend the *Curtis* rule to the Firestone divorce case, declining to equate "public controversy" with controversies of "interest to the public." Justice Powell, concurring, asserted in *Firestone* that the *Firestone* court adhered to the principles of *Gertz.* He further contended that it was evident from the variety of views expressed among the justices that perceptions differed to the application of the *Gertz* principles "to this bizarre case" (the *Firestone* case).

The court notes here that neither *Gertz* nor *Firestone* excludes the application of the public-figure principle to individuals whose achievements have attracted notoriety or general fame in the community (*Gertz,* pp. 812, 806).

The federal courts have recognized the constitutional interest which makes the summary judgment procedure

appropriate in public-figure, public-official libel controversies. *Time* v. *McLaney,* 406 Fed.2d 565; *Washington Post* v. *Keogh,* 365 Fed.2d 965; *United Medical Laboratories* v. *Columbia Broadcasting System Inc.,* 404 F.2d 706 (9th Cir. 1968), *cert. den.,* 89 S.Ct. 1197 (summary judgment for defendant); *Time* v. *Pape,* 401 U.S. 279, 28 L.Ed.2d 45 (1971) (directed verdict for defendant); *Cerrito* v. *Time, Inc.,* 302 F.Supp. 1071 (N.D. Cal. 1969) (summary judgment for defendant); *Baldine* v. *Sharon Herald Co.,* 391 F.2d 703 (3d Cir. 1968) (judgment n.o.v. for defendant).

The California courts have also approved summary judgments in this area of the law. In the leading case of *Belli* v. *Curtis Publishing Corp.,* 25 Cal.App.3d 384, attorney Belli sued Curtis for an allegedly libelous article regarding Mr. Belli's participation as defense counsel in the Jack Ruby trial. The trial court granted the defendant's motion for summary judgment, giving effect to the constitutional principles announced by the United States Supreme Court in *New York Times* and in *Curtis.*

During the course of its opinion, the *Belli* court stated:

> "In *New York Times* the court stated, 'This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.' (376 U.S. 254, 285 [11 L.Ed.2d 686, 709]. See also *Rosenbloom* v. *Metromedia, supra,* 403 U.S. 29, 55 [29 L.Ed.2d 296, 318].)
>
> "In adopting the foregoing rule, and rejecting the contention that truth alone should be a defense, the court in *New York Times* observed: 'A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount —leads to . . . "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.' (376 U.S. at p. 279, fn. omitted [11 L.Ed.2d at p. 706].)" 25 Cal.App.3d, at 389.

Mr. Belli had stipulated that he was a "public figure" and that the trial of Jack Ruby was a matter of "public interest" (p. 388), a stipulation made improvident four years later by *Firestone.*

On the other hand, summary judgment must be denied where triable issues of fact are presented on the issues of malice or public-figure standing. *Goldwater* v. *Ginzburg,* 414 F.2d 324; *Buckley* v. *Esquire, Inc.,* 344 F.Supp. 1133.

Gertz and *Firestone* revive the importance, perhaps ultimately critical in this case, of state libel rules. As held in *Gertz,* "The . . . states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." (347).

In *People* v. *Disbrow,* 16 Cal.3d 101 (2-6-76), the California Supreme Court announced a determination to define constitutional rights in accordance with the California Constitution even though at variance with constitutional evaluations of the United States Supreme Court in the same area of the law. In *Disbrow,* the California Supreme Court rules: "We pause finally to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of Cali-

fornia citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution."

Another group of cases must be briefly noted. In these cases the evaluation of the allegedly libelous material has been influenced by the *Times* principle. Thus, in *Greenbelt* v. *Bresler,* 398 U.S. 610, plaintiff Bresler was seeking to obtain a rezoning of land from the City Council of Greenbelt, Maryland. At a City Council meeting the plaintiff's negotiating posture was characterized as "blackmail." The defendant later reported that comment in its newspaper. In ruling that the use of the word "blackmail" was, as a matter of constitutional law, not defamatory, the Supreme Court opined:

> "For the reasons that follow, we hold that the imposition of liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review. . . . It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: It was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the City of Greenbelt or anywhere else thought Bresler had been charged with a crime."

Also:

Yorty v. *Chandler,* 13 Cal.App.3d 467, 474-475 (1970);

Thuma v. *Hearst Corporation,* 340 F.Supp. 867, 871-872 (1972);

Time Inc. v. *Johnston,* 448 F.2d 378, 384-385 (4th Cir. 1971).

The foregoing cases are but illustrative of the general rule that freedom of the press and speech on public issues should be uninhibited, robust, and wide-open and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government, public officials and public figures. See *Terminiello* v. *Chicago,* 337 U.S. 1, 493 L.Ed. 1131, 1134, 69 S.Ct. 894; *De Jonge* v. *Oregon,* 299 U.S. 353, 365, 81 [376 U.S. 271].

And, of course, the United States Supreme Court approves the ligitimate state interest underlying the law of libel in the compensation of individuals for the harm inflicted on them by defamatory falsehood. *Gertz* v. *Welch,* 418 U.S. 323, 341.

In view of the rulings hereinafter announced in this Memorandum, only a brief observation with respect to the PENTHOUSE article need be now made. The central theme of the authors is the alleged entente from time to time and from place to place between legal business and suspect funds, a theme of national concern since at least the days of the Kefauver Committee. For, as argued by the author of one of the books in evidence, "The lines between legal and illegal activity become blurred at times, especially in areas involving high finance."[1]

Further, LA COSTA is a cultural and economic phenomenon of this society. As disclosed by evidence from both sides in this case, such a phenomenon attracts visitors,

---

[1] Messick—"Lansky"

features personalities of the sports, entertainment and political worlds and inevitably provokes journalistic interest and comments, favorable and unfavorable. The constitutional right of freedom of the press would, indeed, be feeble if it should be precluded from fair comment and probing on such matters. However, as already noted, the standards governing such comments have significantly changed from *Rosenbloom* to *Firestone* on the federal level, and remain to be authoritatively defined on the state level.

The Court has considered in complete detail all the briefs, motions, pleadings, exhibits and evidence in this case. Based upon that review and the authorities above cited, and many others, the Court now states its intended ruling in this case:

1. The motions of defendants for summary judgment with respect to the plaintiffs Moe Dalitz and Allard Roen are granted on all the grounds urged on the merits, but not on the grounds relating to alleged failure to disclose material evidence (discovery motions). *Gertz* v. *Welch, supra; New York Times* v. *Sullivan,* 376 U.S. 254. (See articles in Time, February 19, 1951; Readers Digest, September 1961; Saturday Evening Post, November 11, 1961; Time, March 2, 1970; Atlantic, August 1970; Los Angeles Times, November 2, 1965, October 14, 1965, May 4, 1973; articles in the New York Times, April 26, 1958, March 20, 1962; and many other articles in the principal newspapers and journals in the United States contained as exhibits to Affidavit of Alan M. Gelb, Public Figure File No. 2, and many other articles and books identified in the evidence.) Plaintiffs Dalitz and Roen are clearly public figures under all of the authorities, and said plaintiffs have failed to show malice. *New York Times* v. *Sullivan,* supra.

2. The motions for summary judgment with respect to all other plaintiffs must be denied. Triable issues arise under the *Firestone* case; also, the juxtaposition of the firearms and graphics accompanying the Penthouse article is a factor in the Court's decision on this phase of the case.

3. The order of submission made February 26, 1976, with respect to the parties' discovery motions is vacated. The Court will re-hear those motions on noticed motions of either party, after consulation with the Court as to an appropriate hearing date.

4. Rulings set forth with respect to summary judgment motions are notice of intended rulings only. The Court reserves full jurisdiction to change, modify or vacate such rulings. Counsel are instructed to file any objections or concurrence they may have to the intended rulings within thirty (30) days from the date of this order. Counsel should not attempt to cover all points extensively discussed and briefed in this case. The Court would indicate interest in analysis and summary not exceeding twenty (20) pages for each side of this case. The intended ruling shall become effective and final only after further written order of this Court following the thirty (30)-day period for objection and comments.

This Memorandum and Notice of Intended Decision shall constitute notice to all parties.

Dated: April 5, 1976.

Thomas W. LeSage
Judge of the Superior Court

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 124,901

RANCHO LA COSTA, INC., a Nevada corporation, et al.,

Plaintiffs,

vs.

PENTHOUSE INTERNATIONAL, LTD., a corporation, et al.,

Defendants.

ORDER

The Court has reviewed all briefs and memoranda filed with respect to its Notice of Intended Decision dated April 5, 1976.

That decision shall become effective on the date of this Order. The Court only adds that a necessary premise of the intended decision and this Order is that there are triable issues of fact with respect to whether or not all the plaintiffs (except Mr. Dalitz and Mr. Roen) are public figures.

It is evident to the Court that special consideration must be given to discovery issues in this case. The Court, therefore, instructs and orders all counsel to confer with the objective of reaching a stipulation with respect to all discovery in the following months, including the time and place of contemplated depositions, the order of requests for inspection of documents and the order to be followed in the submission and answers to interrogatories, and all other pertinent matters pertaining to discovery. Counsel are re-

quested and instructed to present said stipulation, for consideration and approval by the Court, within thirty (30) days of this date.

This Order shall constitute notice to all parties.

DATED: June 25, 1976.

THOMAS W. LESAGE
Judge of the Superior Court

Appendix C.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT.

Date July 2, 1976

Honorable Thomas W. LeSage Judge
Honorable Judge Pro Tem
20 Deputy Sheriff

E. Ellis Deputy Clerk 80
None Reporter
(Parties and counsel checked if present)

C 124901

Rancho LaCosta, Inc., etc., et al

vs

Penthouse International Ltd., etc., et al

Counsel for Plaintiff — Phillips, Nizer, Benjamin, Krim & Ballon
Simon & Sheridan

Counsel for Defendant — Buchalter, Nemar, Fields & Savitch
by J. Dito (x)

Finley, Kumble, Wagner, BT
Heine, Underberg & Grutman,
Norman Roy Grutman
Alan M. Gelb

Paul, Hastings & Janofsky
by D. C. Conroy (x)

Nature of Proceedings.
Order re Notice of Intended Decision dated April 5, 1976

Appendix C.

The order dated June 25, 1976, and filed this date, was hand delivered in open court this morning (July 2, 1976), to Mr. Dito and Mr. Conroy. The Court orders the clerk to forward a copy of said order to all counsel of record this date. Notwithstanding the date on said order, it shall become effective July 2, 1976, and shall be deemed dated July 2, 1976.

In accordance with the order filed this date, the intended decision dated April 5, 1976, shall become effective this date.

A copy of this minute order and a copy of the order filed this date is sent to all counsel by U. S. mail.

☐ OFF CALENDAR
☐ On court's own motion
☐ No Appearance
☐ At request of moving party
☐ By Stipulation

AM
☐ CONTINUED TO ..... IN DEPT ..... AT .....
PM

☐ On court's own motion
☐ Stp. to be filed
☐ On oral/written stipulation
☐ REQUEST OF
☐ Moving party
☐ Respondent(s)
☐ TRO to remain in full force and effect
☐ TRO dissolved

Appendix C.

☐ TRANSFERRED TO/FROM DEPARTMENT .....
☐ Court disqualifies itself
☐ 170.6 CCP affidavit filed
☐ IT IS STIPULATED that Commissioner .....
may hear this matter as Judge Pro Tem.
☐ NOTICE:
☐ Waived
☐ By moving party
☐ By respondent(s)
☐ TO STAND SUBMITTED .....

20 Dept. 80

MINUTES ENTERED
July 2, 1976
COUNTY CLERK

APPENDIX D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

2d Civ. No. 49846
(L.A.S.C. No. C 124901)

ORDER

COURT OF APPEAL—SECOND DIST.
FILED
DEC 10 1976
CLAY ROBBINS, JR. *Clerk*

.....
Deputy Clerk

PENTHOUSE INTERNATIONAL, LTD., a corporation; ROBERT GUCCIONE; LOWELL BERGMAN; and JEFF GERTH,
Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent.

RANCHO LA COSTA, INC., A Nevada corporation; LA COSTA LAND COMPANY, an Illinois corporation; LA COSTA MANAGEMENT COMPANY, a California corporation; LA COSTA COMMUNITY ANTENNA SYSTEM, INC., a California corporation; PARADISE HOMES, INC., a California corporation; MERV ADELSON, IRWIN MOLASKY, ALLARD ROEN and M. B. DALITZ,
Real Parties in Interest.

Appendix D.

THE COURT:

The petition for writ of mandate, filed November 5, 1976, has been read and considered. The court has also read and considered the statement in opposition, filed December 1, 1976. Judicial notice has been taken of the contents of this court's file in 2d Civil No. 47612, entitled *Rancho La Costa, Inc.* v. *Superior Court.*

It appearing that there is a sufficient colorable showing of a question of fact so that this court cannot conclude that the respondent court has acted in excess of jurisdiction, the petition is denied.

APPENDIX E

ORDER DUE
January 7, 1977

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 1, Civ. No. 49846

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PENTHOUSE INTERNATIONAL, LIMITED, ETC. et al., Petitioners

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent
RANCHO LA COSTA, INCORPORATED, ETC. et al., RPI

Petition for hearing DENIED.

SUPREME COURT
FILED
Jan 5 1977
G. E. Bishel, Clerk

Wright
Chief Justice

I.G.E. Bishel, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this day of Mar 25 1977.

By G E S
Deputy Clerk

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1355

PENTHOUSE INTERNATIONAL, LTD., a corporation; ROBERT GUCCIONE; LOWELL BERGMAN; and JEFF GERTH,
Petitioners,

v.

RANCHO LA COSTA, INC., a Nevada corporation; LA COSTA LAND COMPANY, an Illinois corporation; LA COSTA MANAGEMENT COMPANY, a California corporation; LA COSTA COMMUNITY ANTENNA SYSTEM, INC., a California corporation; PARADISE HOMES, INC., a California corporation; MERV ADELSON and IRWIN MOLASKY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

IN THE

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Questions Presented

This petition for certiorari from a determination of the California courts refusing to summarily dismiss respondents' libel suit presents the following questions:

1. Whether the case is ripe for Supreme Court review, when there has been no final judgment but only

a determination that the affidavits have established triable issues.

2. Whether this Court should entertain this petition when the Court is asked to determine on affidavits —contrary to the unanimous finding of the California courts—both (a) that respondents Irwin Molasky, Merv Adelson and the La Costa corporate entities are so clearly "public figures" that they should be so declared as a matter of law; and also (b) that respondents cannot establish "actual malice" if they are permitted to go to trial.

3. Whether California's determination that the affidavits present triable issues constituted constitutional error.

Statement of the Case

At issue in this libel action is a grievously defamatory article in *Penthouse* magazine falsely accusing plaintiffs of (among many other things) being members of "organized crime" and the Rancho La Costa resort community in Southern California of being a "syndicate" headquarters where "people could get killed out there and you would never know." In the two years the case has been pending petitioners have presented no proof of the allegations but, citing hearsay and claiming anonymous "sources," have sought to block discovery while unsuccessfully urging the summary dismissal of the action under the doctrine of *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), which requires a "public official" (later extended to "public figure") to prove "malice"—*i.e.,* knowing or reckless falsehood—in order to recover damages for defamation.

The Superior Court, Los Angeles County, initially ruled that all of the plaintiffs were "public figures" but thereupon modified its ruling. Under the compelling authority of *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976), the Court held that plaintiffs Adelson, Molasky and the La Costa corporations (respondents herein), who are not generally known and have not participated in public affairs, could not be held public figures as a matter of law and that there is, at least, a triable issue presented. It also correctly ruled that respondents had raised a triable issue of malice.

Petitioners then applied to the California District Court of Appeal to overturn the Superior Court's ruling by writ of mandate. The writ was denied. The District Court ruled that the record established "a question of fact so that this Court cannot conclude that the respondent court acted in excess of jurisdiction . . ." Upon further application by petitioners to the California Supreme Court, that Court rejected their petition for a hearing.

The California courts have thus upheld respondents' right to a trial. Petitioners' application for certiorari asks this Court to overturn that ruling.

Summary of Argument

1. Since respondents are not well known and have not participated at all in public affairs, they are not "public figures" under *Gertz* v. *Welch,* 418 U.S. 323 (1974) and *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976).

2. Even if the respondents could be deemed public figures, their affidavits have presented striking and detailed

evidence of reckless sensationalism which raises a triable issue of petitioners' "actual malice." *New York Times* v. *Sullivan,* 376 U.S. 254 (1964); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, *rehearing denied,* 389 U.S. 889 (1967); *Goldwater* v. *Ginzburg,* 261 F. Supp. 784 (S.D.N.Y. 1966), *aff'd,* 414 F.2d 324 (2d Cir.), *cert. denied,* 396 U.S. 1049 (1969).

3. The California courts committed no error, therefore, in determining that this case presents triable issues of "public figure" and "malice" which preclude summary dismissal of the complaint.

4. The interlocutory determination is not a final disposition of the issues and does not present a proper case for this Court's intervention by certiorari prior to trial.

Reasons for Denial of the Petition

1. The Case Is Not Ripe for Review.

The order from which this petition is taken denied summary judgment in this case; it was thus not an "effective determination of the litigation" but "an interlocutory or intermediate step" normally not subject to review by this Court. *Gospel Army* v. *Los Angeles,* 331 U.S. 543, 546-47 (1947); *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, 72 (1946); *Market St. Ry.* v. *Railroad Commission of the State of California,* 324 U.S. 548, 551 (1945); *Department of Banking* v. *Pink,* 317 U.S. 264, 268 (1942); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States §§26, 28 at 55, 57 (2d ed. R. Wolfson & P. Kurland 1951); R. Stern & E. Gressman, Supreme Court Practice §§3.12, 4.19 at 172, 180 (4th ed. 1969).

The order denying summary judgment did not determine any issue. It determined only that the issues should not be disposed of summarily but should be tried in plenary proceedings. The order cannot be said to be complete or to finally dispose of all elements of the controversy so as to merit review by this Court. *Cotton* v. *Hawaii,* 211 U.S. 162, 170-71 (1908). *See also American Bakeries Co.* v. *Huntsville,* 299 U.S. 514 (1936) (judgment of highest state court affirming order overruling demurrer held not final).[1]

2. Respondents Are Clearly Not Public Figures. At Minimum, the California Courts Committed No Error in Declining to Decide the Issue Prior to Trial.

Respondents Merv Adelson and Irwin Molasky are private real estate developers. They are two of the principals of respondents Rancho La Costa, Inc., La Costa Land Company, La Costa Management Company, La Costa Community Antenna System, Inc. and Paradise Homes, Inc., which participate in the operation of the Rancho La Costa resort in Southern California.

Petitioners' contention that respondents are "public figures" was and is based on an affidavit of counsel which enumerated all of the published references to any of the plaintiffs that have ever appeared in books, magazines and newspapers. The publications covered a period of approximately 25 years (1951-1975). Most of the cited references,

1. It is of course well-settled under California practice that a denial of summary judgment is interlocutory in nature and not appealable. *See, e.g., Wilson* v. *Wilson,* 54 Cal. 2d 264, 265-66, 5 Cal. Rptr. 317, 352 P.2d 725 (1960) (in bank); *Trani* v. *R.G. Hohman Enterprises, Inc.,* 52 Cal. App. 3d 314, 315-16, 125 Cal. Rptr. 34 (2d Dist. 1975); *Whitney's At The Beach* v. *Superior Court,* 3 Cal. App. 3d 258, 261, 83 Cal. Rptr. 237 (1st Dist. 1970).

however, were in fact limited solely to plaintiff Dalitz, who is not involved in this petition.

The published materials submitted to the Superior Court from books, magazines and newspapers showed *no* magazine references to Adelson or Molasky; and only three passing references to Adelson and one to Molasky in books. Adelson received 16 mentions, and Molasky 10, in the New York, Los Angeles and San Francisco press during the entire twenty-five year period. None of the references was prominent. There were a few additional references (mainly social notes and real estate news) in small town newspapers near La Costa and in Daily Variety. References to La Costa were almost entirely limited to travel and sports columns. There was absolutely no proof, nor any offer of proof, that petitioners are in fact generally known to the public or that any of them has ever participated in public affairs.

The proof was thus similar to—and far weaker than—the proof of "public figure" status offered in *Gertz* v. *Welch,* 418 U.S. 323 (1974), where the plaintiff had expressly admitted *thousands* of writings and public appearances.[2] This Court held in *Gertz* that such an offer of proof is insufficient as a matter of law stating (*Id.* at 352):

> None of the prospective jurors called at the trial had ever heard of [Gertz] prior to this litigation and respondent offered no proof that this response was atypical of the local population.

2. Plaintiffs submitted to the Superior Court certified copies of the *Gertz* record before this Court in which Elmer Gertz expressly admitted literally thousands of writings, appearances, public offices and prominent achievements—all held insufficient to make him a "public figure."

Similarly, in this case there was a total failure of proof.

This Court, in *Gertz,* formulated two categories of public figures. The first included persons who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." With respect to these, *Gertz* held:

> Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. (*Id.* at 352)

The instant respondents clearly were not within this category. Prior to the libelous article in suit, they were known, at most, to a small segment of the community, and they certainly were not "pervasive[ly] involve[d] in the affairs of society." There is no "clear evidence" or any evidence at all to support a public figure finding on this ground.[3]

The second, alternative, category of public figures defined in *Gertz* consists of persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" (*Id.* at 345). It is incontrovertible that the plaintiffs here never thrust themselves to the forefront of any public controversy, either to influence its resolution or for any other purpose.

3. Even the defendants "never heard" of these plaintiffs prior to the *Penthouse* article. At Robert Guccione's deposition, Guccione testified that he could not recall hearing of Irwin Molasky, had never heard of Allard Roen, and thought he might have heard of Adelson but could not recall what he might have heard. (Guccione deposition, November 1, 1976, pp. 18-23)

For this second criterion, the defendants attempted to substitute one of their own, arguing to the Superior Court (and again here) that the *New York Times* privilege applies as long as the libeled plaintiffs are allegedly involved in a subject of "public interest." That formulation had been enunciated by a divided court in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), but was squarely *overruled* in *Gertz*, as this Court made crystal clear in *Time, Inc.* v. *Firestone*.

In *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), which the Superior Court properly followed, this Court held that a famous socialite, whose divorce proceeding had become a "cause celebre" was not a "public figure" under either of the two standards defined in *Gertz*. This Court reaffirmed its "rejection" of the *Rosenbloom* "subject matter test" as a basis for applying the *New York Times* privilege and ruled that the relevant inquiry should be "confin[ed] . . . to whether a plaintiff is a public officer or a public figure who might be assumed to have voluntarily exposed themselves to increased risk of injury from defamatory falsehood . . ." (*Id.* at 966). The Court said:

> Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it. (*Id.*)

Precisely the same is true of the present respondents. They have not assumed special prominence in the affairs of society other than their private resort in Southern California. Even more clearly, they have not thrust themselves to

the forefront of *any* public controversy in order to influence the resolution of the issues involved in it. They have simply been the involuntary victims of a defamatory attack.

The same is true of the corporate respondents. They clearly do not have "general fame or notoriety in the community and pervasive involvement in the affairs of society" (*Gertz, supra*); nor have they thrust themselves into any public issue. Operation of a successful resort hotel—one of a great many in this country alone—does not render privileged an abusive attack against that hotel as being "established and . . . frequented by mobsters." The cases so hold. *Mashburn* v. *Collin*, 2 Med. L. Rep. 1555 (La. Ct. of App., 1st Cir. Dec. 20, 1976); *Drotzman's, Inc.* v. *McGraw-Hill*, 500 F.2d 833 (3d Cir. 1975); *El Meson Espanol* v. *NYM Corporation*, 389 F. Supp. 357 (S.D.N.Y.), *aff'd*, 521 F.2d 737 (2d Cir. 1975); *Bavarian Motor Works* (*B.M.W.*) v. *Manchester*, 61 Misc. 2d 309, 305 N.Y.S.2d 593 (Sup. Ct. 1969); *Grove* v. *Dun & Bradstreet*, 483 F.2d 433, 436 (3d Cir. 1971). As was stated in *El Meson Espanol* v. *NYM Corporation, supra*, referring to *Gertz* v. *Welch*:

> If he [Gertz] is not [a public figure] *a fortiori, a corporation operating a place of public accommodation (a bar and grill) and holding itself out to the public as operating a safe and proper place to go is not a public figure.* (389 F. Supp. at 359) (emphasis added)

In the recent case of *Mashburn* v. *Collin, supra*, the Court similarly held:

> A reading of the recent case of *Time, Inc.* v. *Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed. 2d 154 (1976) and the case of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974) brings us to the conclusion that the Supreme Court has held that

> unless a person thrusts himself to the forefront of a particular public controversy in an effort to influence the resolution of the issues involved in the controversy or assumes a role of especial prominence in the affairs of society, he is not considered a *public figure*. The fact that Mr. Mashburn ran a restaurant open to the public and advertised his restaurant publicly does not make him a *public figure* within our appreciation of the United States Supreme Court definition thereof. Mr. Mashburn has in no way attempted to influence society by the act of operating a restaurant business. (2 Med. L. Rep. at 1556) (emphasis in original)

Quite obviously if Mrs. Firestone was, as a matter of law, *not* a public figure, it would be anomalous to hold as a matter of law that Irwin Molasky, Merv Adelson and the La Costa corporations *are* public figures. It is irrelevant to argue (as do the petitioners) that respondents have met and associated with famous people—as Mrs. Firestone certainly did; or that they called a news conference to announce this suit—Mrs. Firestone called a *series* of such highly publicized news conferences. The present record clearly will not support a "public figure" determination under the clear rulings of this Court. At minimum, there was no error by the California courts in reserving the "public figure" issue for trial.

3. Even if the Respondents Could Be Considered "Public Figures," the Abundant and Striking Evidence of Reckless Sensationalism in the Publication of the La Costa Article Would in Any Event Require a Trial.

Even if there were any basis for holding respondents to be "public figures"—and hence subject to the burden of proving "malice" in the constitutional sense—there is

ample evidence in the present record that the La Costa article was published with reckless disregard for the truth, so as to satisfy the *New York Times* v. *Sullivan* standard. The California courts committed no error in determining that a genuine issue of "malice" was presented.

New York Times Co. v. *Sullivan,* 376 U.S. 254 (1964), defined the "malice" required to rebut the *Times* privilege as publication "with knowledge that [the libel] was false or with reckless disregard of whether it was false or not" (*Id.,* at 279-80). The present case is a classic instance of recklessness in the sense intended by *New York Times* and as defined in the cases that have followed it.

In *Curtis Publishing Company* v. *Butts,* 388 U.S. 130, *rehearing denied,* 389 U.S. 889 (1967), the first Supreme Court decision to extend the public official privilege to "public figures," the Court had occasion to define more fully the standard of "reckless disregard" of the truth. The case involved an article in the *Saturday Evening Post* falsely accusing plaintiff of having conspired to "fix" a football game. The *Saturday Evening Post* had accepted the author's conclusions without examining his informant's notes and without submitting the article for review by anyone expert in the subject matter (professional football). The Supreme Court found this conduct "reckless" in the constitutional sense and rendered judgment for the plaintiff. It based this decision in part on the fact that the *Post* had introduced a policy of "sophisticated muckraking" which had induced a relaxation of its previously high publishing standards. The Court said:

> The evidence showed that the Butts story was in no sense "hot news" and the editors of the magazine

recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored . . .

Burnett's notes were not even viewed by any of the magazine's personnel prior to publication . . . No attempt was made to screen the films of the game to see if Burnett's information was accurate, and no attempt was made to find out whether Alabama had adjusted its plans after the alleged divulgence of information.

The Post writer assigned to the story was not a football expert and no attempt was made to check the story with someone knowledgeable in the sport . . . The Saturday Evening Post was anxious to change its image by instituting a policy of "sophisticated muckraking," and the pressure to produce a successful expose might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. (*Id.* at 157-58)

Chief Justice Warren, concurring, agreed that the evidence supported a finding of "malice" under the most rigid statement of the *Times* standard. He wrote:

> The petitioner in this case is a major factor in the publishing business . . . an editorial decision was made to "change the image" of the Saturday Evening Post with the hope that circulation and advertising revenues would thereby be increased. The starting point for this change of image was an announcement that the magazine would embark upon a program of "sophisticated muckraking," designed to "provoke people, make them mad." . . . The slipshod and sketchy investigatory techniques employed to check the veracity of the source and the inferences to be drawn from the few facts believed to be true are detailed at length in the opinion of Mr. Justice Harlan . . . I am satisfied that the evidence here discloses that degree of reckless disregard for the truth of which we spoke in New York Times and Garrison. Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers. (*Id.* at 169-70)

The present facts demonstrate far greater recklessness on the part of *Penthouse* than was proven against the *Saturday Evening Post* in *Butts.*

The affidavits, depositions and documents in this case have established *inter alia,* the following facts:

1. Defendant *Penthouse* is a notoriously and deliberately sensationalist publication which, since its introduction in the United States in 1969, has been engaged in a highly publicized head-to-head circulation war with its archrival, *Playboy.* Its editorial policies are aptly symbolized by a placard on its executive editor's wall reading, "DAMN LE MOT JUSTE—FULL SPEED AHEAD." Its publisher, Robert Guccione, is known as the man who first "went pubic," based on his introduction in *Penthouse* of full frontal nudes—and who then "went pink" by displaying *Penthouse*'s nudes with legs spread wide. He has admitted in published interviews that he has had to pay numerous libel judgments for false and defamatory publications, which seem, indeed, a permanent fixture of his magazine. The very inception of *Penthouse* was marked by an immediate libel suit by Lord Bertrand Russell for a false advertisement that Lord Russell had purportedly agreed to write for the magazine. Guccione paid substantial damages and admitted the falsity of the advertisement in Court.

2. Immediately prior to the La Costa article *Penthouse* published an "organized crime" series entitled "The Last Testament of Lucky Luciano," which was exposed as a hoax. The "Luciano" series was publicized by *Penthouse* as Luciano's own story, purportedly derived from tape recorded interviews. The *New York Times* revealed, however, in January 1975 (two months before the La Costa article) that the "Luciano" series was largely a re-hash of previously published materials, that no tape recordings of Luciano interviews existed, that Little Brown & Co. had blamed *Penthouse* for inventing the reference to alleged tape recordings, and that many of the "facts" published in *Penthouse* were impossible because Luciano was dead or in prison at the time. A crime expert commenting further in the *New York Times* criticized the failure to submit the manuscript to specialists in view of the "serious charges" it contained; pointed out that the vast flood of "organized crime" literature (so-called "Godfather literature") from which the "Luciano" series was derived, was notoriously unreliable; called "Luciano" the "rough equivalent in the Wall Street world of watered stock"; and termed the whole affair a "literary Watergate."

3. Immediately after publication of the La Costa article, *Penthouse* published a series on the Kennedy assassination. Guccione sent an advance copy of the series to President Ford. He received a reply from counsel to the President, enclosing an analysis concluding that the *Penthouse* study involved *"deliberate misrepresentation of the truth,"* including *"misrepresentation by omission of key portions of the record and misrepresentation by misstating key portions of the record"* (emphasis added).

4. The La Costa article was thus sandwiched between the "Luciano" series (a "literary Watergate") and the Kennedy assassination series (a "deliberate misrepresentation of the truth"). In the meantime, a draft of the La Costa article had languished in the *Penthouse* editorial offices for months. In October 1974 (four months after submission), an editor described its editorial condition as "poor," and concluded, "I still think this doesn't work. It's too choppy, too full of names, the writing is primitive, and after all, it's still about a hotel." He called it "an albatross." It nevertheless was published. It has provoked three separate libel suits, including this one.

5. Contrary to petitioners' assertions, *Penthouse*'s editorial staff did nothing to verify the accuracy of the article. *Penthouse* Articles Editor, Peter Bloch, stated explicitly in his affidavit herein that the contribution of *Penthouse* to the article "was *purely editorial,* condensing, organizing and rewriting it in light of traditional considerations of style, grammar and concise presentation" (emphasis added).

6. The authors of the La Costa article, Jeff Gerth and Lowell Bergman, were novices. They were first hired by *Penthouse* to do an article accusing President Nixon of ties to organized crime ("Richard M. Nixon and Organized Crime," *Penthouse* July 1975). Each of them had written only one prior article apiece—one in *Ramparts* and one in *Sundance* magazine (a counter-culture bi-monthly, now defunct). Guccione, however, falsely represented to *Newsweek* that he had "put together a special investigative

reporting team comprised of former members of the CIA and FBI.'"[4]

7. Contrary to respondents' allegation that the reporters engaged in "eighteen months" of careful investigation of the La Costa article, their pretrial testimony showed that they in fact completed the article within eight or nine weeks. The La Costa article was commissioned on May 1, 1974 and was submitted by "late June" or "early July" of 1974 according to their own testimony. It then languished for months, described by an editor as "poor," "primitive" and "an albatross," before it was finally published.

8. The authors' thesis (dramatically demonstrated by the title of the La Costa article emblazoned on the front cover of *Penthouse*—"La Costa: Syndicate in the Sun")—was that La Costa was a "syndicate" venture, founded and run by organized crime with illicit "laundered" funds. Their own drafts and research notes showed that they had uncovered no evidence to support such a thesis and much evidence to the contrary:

(a) Their notes showed that according to the Sheriff of San Diego County, La Costa had been subjected to "continuous intelligence . . . always giving the place a clean bill" and that when asked if criminal activity had been detected at La Costa he replied, "No. Not a thing." They neither heeded this comment nor reported it in the article.

4. Gerth and Bergman had no FBI or CIA experience. Their depositions established that they had each previously held a succession of jobs for a few months at a time (camera store clerk, census taker, market researcher, etc.) having nothing to do with law enforcement.

(b) A supervisor of San Diego County familiar with La Costa also rejected such allegations when similarly queried, and called the accusations the product of "insane jealousy among some people with sick minds." The reporters disregarded this, too.

(c) The Attorney General of California was asked by the authors about purported state investigations of La Costa and the "Baptist Foundation Swindle." The Attorney General replied that he knew of no such investigations. He also stated that there was no significant "syndicate" influence in California. The first draft of the La Costa article quoted him to that effect, saying "the so-called Mafioso, Cosa Nostra types, the Godfather sort of thing exists to a very minimum degree here." However, the quotation was *deleted* from the article prior to publication.

(d) The authors' first draft also stated that the La Costa management actively "discouraged a variety of gamblers and swindlers from hanging around." This, too, was *deleted* from the article, which alleged instead, as a central part of its attack, that La Costa was a gathering place for such characters.

(e) One of the authors wrote in his own notes that, "There are numerous reports of big gambling at La Costa" but that his own visits gave him the contrary impression. He concluded: "If we are to write up illegal activities at La Costa, this seems petty and weak." The La Costa article nevertheless contained gambling allegations, contrary to the fact.

(f) The article implied a connection between La Costa's owners and the planning of the Watergate

"cover-up," whereas the authors acknowledged that the only basis for such an allegation was that John Dean and other members of the White House staff stayed at La Costa (a few miles from the Nixon home at San Clemente). Gerth testified, in fact, that he had no information that even suggested "that the management or people at La Costa knew, *per se,* that meetings were taking place between Mr. Dean, Haldeman and Ehrlichman"—much less that they were privy to or in any way implicated in the plottings.

(g) The authors also acknowledged that their investigations showed nothing to support charges in the article that La Costa was built with "mob" funds. Co-author Jeff Gerth claimed he had thoroughly investigated allegations charging the investment of "laundered" funds in La Costa. The only source of information on "laundered money" that he was willing to name was Robert Morgenthau, then U.S. Attorney in New York. Gerth claimed to have talked to Morgenthau at length. He was then asked "Did he [Morgenthau] say anything about La Costa or the plaintiffs in this case?" He replied, "I don't think so." He then admitted that in fact his investigations had produced no evidence whatever to support such a charge. Nevertheless, the article claimed that La Costa was built because "the legal and illegal profits of the mob's worldwide operations needed more outlets."

(h) The article asserted that "the greedy manipulations of the men who hold their meetings at La Costa have contributed to a massive bank failure." Petitioners' only support for this statement was that La

Costa had received mortgage loans from C. Arnholt Smith's U.S. National Bank. The mortgages were routine, were not in default, and petitioners showed no basis for blaming La Costa for "contributing" to the failure of the bank.

(i) The article similarly attributed "a plague of security frauds that have been estimated to cost Americans *fifty billion* dollars" to "greedy manipulations" planned at La Costa (emphasis supplied). When challenged, petitioners could not even define what the article was referring to when it claimed a "fifty billion dollar" fraud. The purported link to La Costa of such a vast swindle has remained a complete mystery. The petitioners cannot even explain the charge, let alone support it.

(j) The article similarly charged that "greedy manipulations" and "illicit financial operations" at La Costa have "helped tighten the market for the average citizen trying to borrow money as well as encouraging the inflationary spiral" and have "cost taxpayers uncounted millions of dollars." These charges have also remained unsupported and unexplained—pure sensationalism in the "big lie" tradition.

(k) The La Costa article also referred to a "$26 million stock fraud" perpetrated by the "Baptist Foundation of America," which it asserted had close ties to the "La Costa-Teamsters clique." When respondents stated they had never even heard of such an organization and certainly had no "close ties" to it, the reporters contended that some of the individuals

involved in the alleged "Baptist Foundation Swindle" had borrowed money from the Teamsters—thereby allegedly establishing "close ties" to the "La Costa-Teamster clique" because La Costa is also a Teamster borrower. The allegation was thus still another (and typically remote) exercise in guilt-by-association in which the article repeatedly indulged.[5]

(1) The authors claimed they relied on three "official reports." The documents, when produced, bore no mark of identification establishing that they were official. They admittedly had not been authenticated. Furthermore, they did not support the authors' charges. One of them, a document the authors claim to have emanated from the FBI, speculates about crime influence in La Costa and concludes that, *"It is possible that a top LCN [La Cosa Nostra] member may be observed in the Rancho La Costa area, possibly as a guest or visitor, but there is no indication such person will move in as a part of the management or policy making group at Rancho La Costa"* (emphasis added). This statement in a document the petitioners claim to have relied upon as an official FBI pronouncement is the exact opposite of the position they took in their La Costa article.

5. Again, petitioners have not even set forth the facts of the alleged Baptist Foundation swindle (such as where and when it took place, what the swindle consisted of, what enforcement agencies were involved, what individuals were convicted) and still less, any connection between it and the plaintiffs.

Declaration of Sheriff John Duffy

In opposition to defendants' motion for summary judgment, plaintiffs submitted the Declaration of Sheriff Duffy of San Diego County, in which he said, "I have stated publicly in the past, and I state again for the use of this court that La Costa and the La Costa development has been routinely scrutinized by the San Diego County Sheriff's office for many years. No evidence of criminal activity by La Costa or the management of La Costa of any kind has ever been detected at the resort." In view of Sheriff Duffy's known position (which the authors had recorded in their own notes) it is particularly reprehensible that the authors not only ignored the Sheriff's opinion—which directly refuted their accusations—but charged in the article that La Costa had engineered its annexation to the town of Carlsbad so that "surveillance by the San Diego Sheriff's office will [now] be restricted!"

Report of the San Diego County Grand Jury

In 1976 a San Diego County Grand Jury investigated allegations of organized crime involvements in San Diego County. The Grand Jury's final report noted that it had received a number of allegations of organized crime activity in San Diego County, had investigated them all and that, "all this effort did not develop one provable, or prosecutable case". The Grand Jury added:

> In many of them there was a fragment of truth, but *in the telling and retelling (perhaps in some cases due to malice), the facts became distorted.* Once again, *ill-considered statements* by police officials, *associations* with known organized crime figures, *stupid jokes,*

or *unfounded suspicions* were the root of these allegations (Report entitled "Organized Crime in San Diego County" submitted on July 7, 1976 by the 1975-76 San Diego County Grand Jury) (emphasis added).

Affidavit of Professor G. Robert Blakey

Respondents also submitted a detailed affidavit by Professor G. Robert Blakey, Professor of Law at Cornell University, in opposition to petitioner's motion for summary judgment.

Professor Blakey, who is the Director of the Cornell Institute on Organized Crime, has acted as an expert consultant to government and to publishers (including *Time, Life* and *Look* magazines), in connection with investigative work addressed to the issue of organized crime. He was one of four principal consultants to the President's (President Johnson) Commission on Law Enforcement and the Administration of Justice, assisted in the preparation of the landmark 1967 Task Force Report of the Commission entitled *Organized Crime* and was the author of one of the four basic studies on which it was based. He previously served in the Department of Justice under Robert Kennedy as a Special Attorney in the Organized Crime and Racketeering Section, and for four years was Chief Counsel of the Senate Subcommittee on Criminal Law and Procedures (the McClellan Committee). He has been a consultant on organized crime to the National Commission on the Reform of Federal Criminal Laws and the Commission to Review National Policy Toward Gambling. He is a member of the Organized Crime Task Force of the National Advisory Committee on Standards and Goals sponsored by the Law Enforcement Assistance Administration of the U.S. Department of Justice. He is unquestionably one of the country's preeminent experts in the field of organized crime. In Professor Blakey's affidavit he stated that he had fully reviewed the motion papers submitted on both sides and was of the view that the defendants' motion "does not deserve to be granted."

Professor Blakey first set forth the reasons for his concern in this matter, stating:

> I have been a participant in much of the serious investigative and enforcement effort devoted to the control of organized crime over the past sixteen years. At the same time, I have been a fascinated observer of the growth of the unfortunate mythology that has developed around the subject. I view this present libel suit, therefore, as presenting a unique opportunity for judicial analysis and public instruction in the distinction between myth and fact.
>
> Over the past twenty years, literally hundreds of books and countless articles have been written on the subject of the "mob," the "Mafia" and "organized crime." Many of them have been enlightening and valuable. Nevertheless, the public has remained singularly unenlightened by the literature and has never been aroused by it to serious and sustained action. Part of the reason has been the very glut of popular literature and the fictional quality of so much of it. Literary exploitation of a "blood-and-guts" subject is obviously inevitable, but it often serves as an obstruction to serious social analysis and law enforcement efforts.
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>
> Responsible, hard-fighting journalism can be highly supportive of law enforcement efforts; it is frequently deserving of our gratitude. Irresponsible, unprofessional sensationalism is not responsible journalism;

it serves no significant public purpose; and it is many times actually counter-productive. Such careless sensationalism deserves no one's thanks, and it is not usually entitled to the Constitutional protection the Supreme Court has extended to the press, since it is usually not published in good faith, and it is usually published with a "reckless disregard" for truth.

Professor Blakey stated that his review of the La Costa article, the motion papers and his own knowledge of the vast popular and serious literature of organized crime had convinced him that the La Costa article was "a prime example of the counterproductive sensationalism serious specialists abhor" and that petitioners' conduct "appears reckless in the extreme." He stated a number of reasons.

Professor Blakey first pointed out that "*Penthouse* is not known or recognized for its investigative reporting but for its sensationalist and rather salacious attention to sex." He acknowledged that "this does not necessarily disqualify the magazine from doing serious work but the fact is that its prior ventures into the field of organized crime have tended to establish its unreliability and to raise serious doubt of its good faith generally, but particularly in this area."

Professor Blakey then reviewed the history of *Penthouse's* involvement in the publication of the "Luciano" series, pointing out that the series was recognized by experts as a hoax. He was also familiar with *Penthouse's* other article by Bergman and Gerth, "Richard M. Nixon and Organized Crime," which he knew to contain inaccuracies. He added that Gerth and Bergman had no personal reputations in the field of organized crime reporting and

that their three published articles on the single theme of an alleged connection between former President Nixon and organized crime (one in *Ramparts,* one in *Sundance* and one in *Penthouse*)

> appear to be substantially the same article, rewritten and republished three separate times. They do not appear to be investigative pieces, but a rewrite of previously published material. They do not establish Gerth and Bergman as serious investigative reporters, but as individuals who are exploiting a currently popular theme without original research or indeed serious thought.

Turning to the La Costa article itself, Professor Blakey showed there was absolutely no evidence to support the "Watergate" charge, the "Baptist Foundation" accusation, the "fifty billion dollar swindle" allegation, or the bank failure charge. He analyzed in detail the "evidence" cited to support the "syndicate" charges, showed that it narrowed down to seven specific documents—four news articles and three purportedly "official" documents, demonstrated that the "official" documents had not been authenticated, and showed that neither they nor the news articles supported *Penthouse.* He concluded, "It is clear that the *Penthouse* allegations went far beyond the material that is now cited to support them. No factual basis appears for the [*Penthouse*] assertions . . ."

Professor Blakey pointed out, finally, that even rumor and speculation have centered primarily on plaintiff Dalitz, not the other plaintiffs; that Dalitz was entitled to a fair trial and that the other plaintiffs "are *even more* so entitled" (emphasis in original).

The Superior Court determined that at least respondents Adelson, Molasky, and the La Costa corporations were indeed entitled to a trial. The California District Court of Appeal and the Supreme Court of California agreed.

The lower courts' refusal to dismiss this action as to Merv Adelson, Irwin Molasky and the La Costa corporate entities was clearly correct. The record in no way justifies the defendants' application for Supreme Court intervention by writ of certiorari. Factual issues are plainly presented in this case which in justice should be tried. *See, e.g., Goldwater* v. *Ginzburg*, 261 F. Supp. 784 (S.D.N.Y. 1966), *aff'd*, 414 F.2d 324 (2d Cir.), *cert. denied*, 396 U.S. 1049 (1969).

Conclusion

This Petition Should Be Denied.

Respectfully submitted,

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APPENDIX

PENTHOUSE

02242

THE INTERNATIONAL MAGAZINE FOR MEN

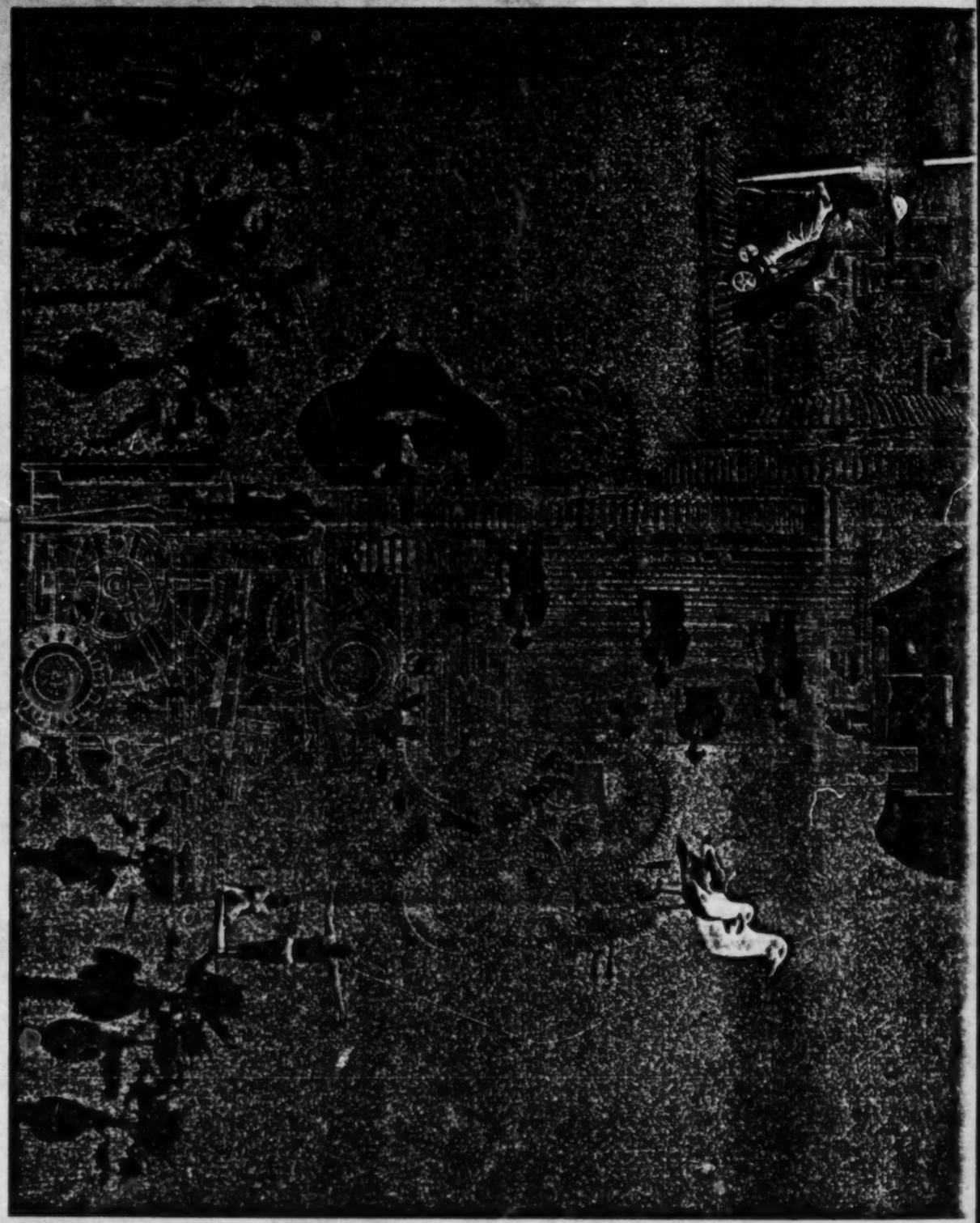
MARCH 1975 $1.25

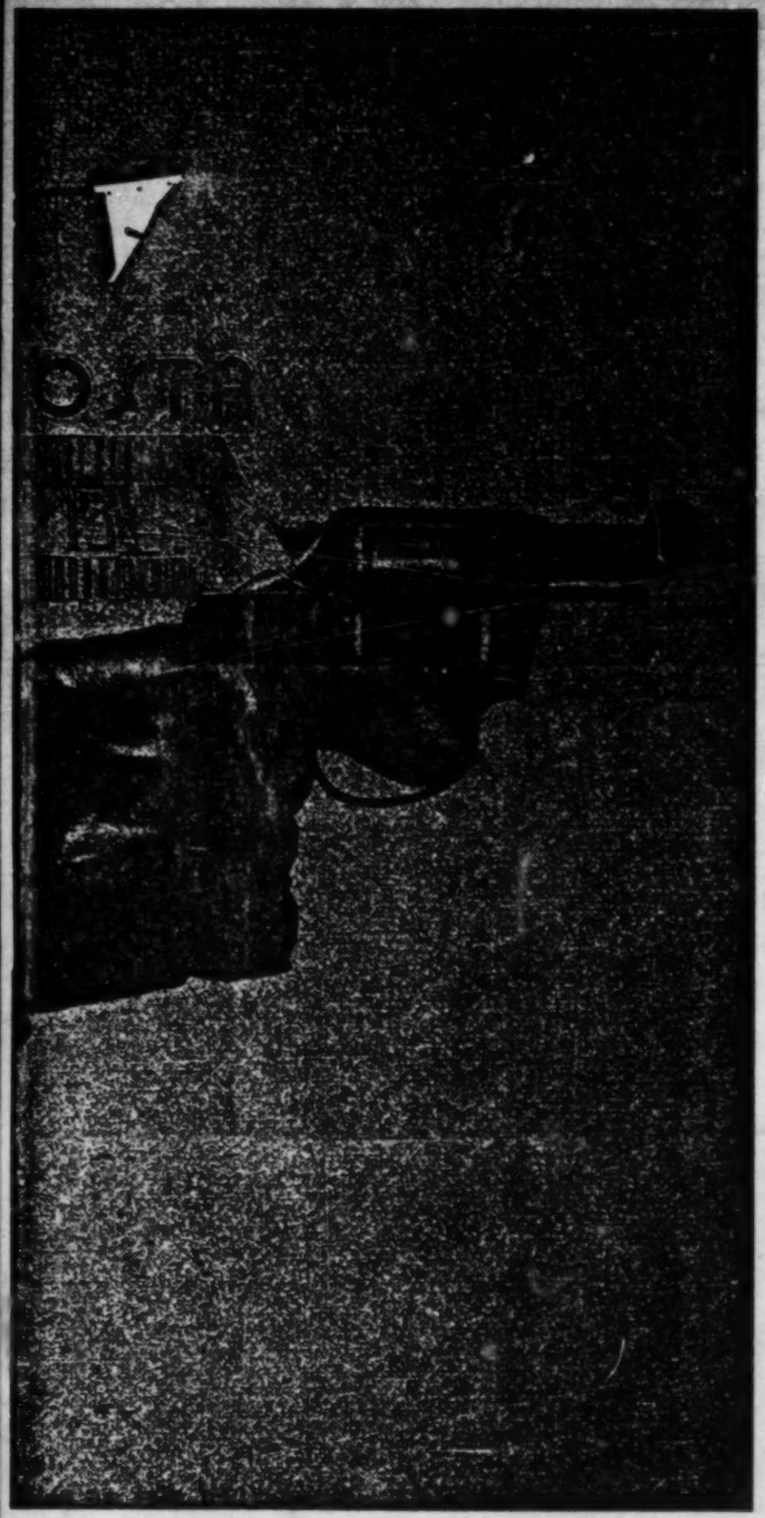
LA COSTA: SYNDICATE IN THE SUN

THE BUYING OF AMERICA: FOREIGN MONEY MOVES IN

THE HAPPY HUSTLER: A MALE HOOKER TELLS IT ALL

VIETNAM VETERANS: EXCLUSIVE PENTHOUSE POLL ON AMNESTY





The Hundred-Million-Dollar Resort with Criminal Clientele

LA COSTA

By Lowell Bergman and Jeff Gerth

"I received a call from Ehrlichman in San Clemente telling me . . . to come to California that night so that he could discuss in full detail the problems of how to deal with the forthcoming Senate hearings. Everyone was staying at the La Costa Resort Hotel."—Testimony of John W. Dean III before the Senate Select Committee on Presidential Campaign Activities, June 25, 1973.

"Hell, what's to keep La Costa from becoming the site of [another] Apalachin convention? . . . They could hold a two- or three-day meeting, and we'd never even know the damned thing was going on."—A San Diego law-enforcement officer, quoted in the Los Angeles *Times*.

Rancho La Costa is a 5,600-acre California coastal complex located thirty miles south of Nixon's San Clemente estate. It is a luxurious arrangement of residential units, a resort hotel, a theater, a golf course, the only AMA-approved health spa in the country, various convention facilities, and a country club. It cost close to $100 million to build, and more than a thousand employees look after its maintenance.

It looks very innocent. But in reality this rich man's playground, patronized by powerful figures from business, labor, and government, was established and is frequented by mobsters.

The greedy manipulations of the men who hold their meetings at La Costa have contributed to a massive bank failure and to a plague of security frauds that have been estimated to cost Americans fifty billion dollars. These manipulations have helped tighten the market for the average citizen trying to borrow money as well as encouraging the inflationary spiral. In addition, the illicit financial operations planned at La Costa have cost taxpayers uncounted millions of dollars, not only in uncollected income taxes but also in other, more complicated ways.

The interwoven jungle of deals, arrangements, and associations—directed by keen legal and financial architects operating with a seemingly unlimited reserve of cash—has resisted the probings of most investigative reporters and has blunted, or corrupted, most of the official investigations.

The primary founders of La Costa were syndicate "bluebloods." Their roots were in Prohibition rum-running and bust-out gambling. The bulk of the financing for La Costa since its inception ten years ago has come from friends in the scandal-ridden Teamsters Central States Pension Fund. Additional funds were made available by C. Arnholt Smith's United States National Bank of San Diego. A member of Nixon's inner circle along with Bebe Rebozo and Robert Abplanalp, Smith ran into trouble early in the Watergate struggle. In October 1973, the Federal Deposit Insurance Corporation declared his billion-dollar bank insolvent, ending one of the largest financial frauds in history.

Rancho La Costa has been controlled by the Moe Dalitz mob—which includes Dalitz, Allard Roen, Merv Adelson, and Irwin Molasky. (They use the acronym DRAM, made up from the first letters of their last names, as a kind of corporate shorthand.) Dalitz has been a prime mover in transforming organized crime into a financial powerhouse. At seventy-five, he is a senior mentor among the criminal aristocracy. A close friend commented, "You'd never guess who he is if you saw him. He's a little man with a round head who walks around with his arms wrapped behind his back like Groucho Marx."

He and his partners at La Costa represent a major force in entertainment, television (Lorimar Productions, founded by Adelson and Molasky, among others, produces such shows as "The Blue Knight," "The Waltons," etc.), construction, laundries, and, of course, gambling. It was Dalitz who persuaded the then-president of the Teamsters Union, James Riddle Hoffa, to finance Las Vegas casinos, starting with Moe's Desert Inn and related properties, with Teamsters retirement cash.

The La Costa operation is an extension of services the crime syndicate people provide in their Las Vegas casinos. Events at La Costa are regularly featured in society columns and travel sections. This adult playground has attracted glamorous jet-setters as well as a horde of underworld heavyweights. La Costa regulars include John "Jake the Barber" Factor, who has been identified in news reports as a notorious international confidence man and stock swindler; Allen Dorfman, a special consultant to the Teamsters Pension Fund who was convicted of kickbacks and is currently under indictment; Jim Braden (Eugene Hale Brading), mob courier and "lovebird swindler," as he was known in Dallas; Arnold Kimmes, a San Diego "developer" who has served time for fraud; Anthony Giacolone, a mob boss in Detroit; Louis "the Tailor" Rosanova, a Chicago mobster now headquartered in Georgia; and Anthony Spilotro, a notorious thug from Las Vegas.

A veneer of respectability is maintained by a host of resident celebrities, including Sandy Koufax, Hoagy Carmichael, and Desi Arnaz. Country-club members and regular guests such as Frank Sinatra, Bing Crosby, and Dean Martin rub elbows with Henry Ford and others of the established rich.

Moe Dalitz likes gold and tennis—tastes acquired since the old days. Accordingly, La Costa is studded with more than twenty tennis courts. When Dalitz left his Las Vegas home adjoining the Desert Inn course, it was to relocate in an almost identical house next to the La Costa course—the world's largest and costliest ($2.4 million to date).

The PGA Tournament of Champions, formerly a Desert Inn feature, was moved to California by Dalitz. It typifies the La Costa style. Each player gets $2,000 plus expenses just for showing up. Until 1971, the 170 crowd-control marshals were active-duty U.S. Marines bussed in daily from Pendleton. They were fed all week and given golf hats and windbreakers for their troubles.

The nerve center of La Costa is the country club, which houses the land-sale office, golf shop, restaurants, swimming pool, and meeting rooms. The latter have been the site of numerous executive-board Teamsters meetings. When business and security are primary, the management makes use of six "executive houses" nearby. Here the most important VIP's can relax, safe from the curious as well as from the surveillance of law-enforcement agencies.

The nature of the clientele makes understandable La Costa's preoccupation with security. A great many important politicians have stayed there. High-ranking White House staff members used La Costa's secure grounds for planning parts of the infamous Watergate coverup. Up until the time this was revealed by John Dean, public figures of both parties could be found taking the waters there. They included Cook County judges and Nevada lawmakers as well as senators and congressmen who took off weight at the spa and hobnobbed with show-business celebrities in the bar.

Republican Senator Jacob Javits of New York was a frequent visitor. Sources close to La Costa claim that Javits was considered a "special guest" who received services on the cuff. Contacted in Washington, the senator acknowledged through an aide that he had stayed at the resort, but insisted he had paid his own bills.

An aide to Arizona's Republican Senator Barry Goldwater told *Penthouse* that the senator has been a "close friend" of C. Arnholt Smith's for some time and that Goldwater has "nothing but sympathy for Smith." As for visits to La Costa on the part of the senator, the aide remarked, "it would surprise me if he hasn't."

And why not? The senator's brother, Robert, was a charter member of La Costa and is a frequent participant in Teamsters outings there—fun things such as the Frank Fitzsimmons Golf Tournament, named in honor of the Teamsters president. Also, the Goldwater family owns a large part of the Valley National Bank of Phoenix. *Penthouse* has documented the use of the Valley National Bank by C. Arnholt Smith to obtain personal funds at a time when federal investigations were tightening a noose around Smith's empire. In July 1973, the SEC alleged that Smith, in violation of the law, was selling debentures issued from his U.S. National Bank after the SEC had filed its suit in May 1973. Some of these debentures were pledged to the Valley National Bank to support loans it had made to Smith.

BIG CRIME IS BIG BUSINESS

The triumvirate of government, business, and organized crime has been a fact of life for years. More recently, labor leaders have joined the club. In their parallel drives for profit and power, the gangsters became businesslike while many entrepreneurs and union leaders adopted gangster methods. Back-room poker players and candy-store bookies have become tycoons controlling billion-dollar cash flows. Former hit men are now experts at security frauds and aspiring Horatio Algers cultivate the fine art of the fix.

The business of the mob has spread everywhere. Lucky Luciano fondly recalled in 1961 how his outfit had "muscled into the milk business. *And we're still there.*" Jonathan Kwitny described in the *Wall Street Journal* how a mob-related "brokerage" business in New York levied a fifty-cent tariff on every 100 pounds of beef brought into the metropolitan area. Kwitny's story went on to detail how payoffs were made to union officials on behalf of the nation's largest beef packer.

The continuity of the La Costa gang's history brings the nature of organized crime into focus. In 1949, when Elliot Ness (of "Untouchables" fame) was Cleveland's Public Safety Director, he drove Dalitz and his friends from the shores of Lake Erie. The Cleveland Syndicate, while maintaining influence in the East through protégés, spent the next twenty years presiding over a hotel and gambling empire in Las Vegas.

The comfortable cover of Las Vegas was destroyed by Attorney General Robert Kennedy. By 1964, DRAM's casinos were infested with wiretaps and special surveillance teams looking for "skim" (unreported income from gambling). Then Allard Roen, Dalitz's favorite uncrowned prince, was forced to plead guilty to a felony rap in what turned out to be one of the largest stock frauds on record. Dalitz himself was enmeshed in a tax-fraud case; he escaped by having his accountant take the rap.

The new heat, along with burgeoning opportunities in real estate, convinced DRAM to shift their base to California.

By the early Sixties, organized crime had a working relationship with San Diego's power elite. C. Arnholt Smith and his ex-shoeshine boy and protégé, John Alessio, exercised total control over San Diego and its neighboring Mexican city of Tijuana. Smith had reigned for a quarter of a century as chief money lord and political boss of San Diego city and county. Through Alessio's Agua Caliente racetrack and international

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LA COSTA

CONTINUED FROM PAGE 48

bookmaking operation, the mob could "lay off" huge amounts of money.

Through Alessio, Smith's bank—the U.S. National Bank of San Diego—swelled with the receipts of Tijuana's Caliente track and international bookmaking. North of the border, Alessio became an important figure in the Democratic Party, while Smith rubbed elbows with the Republicans. Smith became, in the words of President Nixon's wife, Pat, "one of our earliest supporters." Until Watergate, he was also one of the biggest supporters.

Most observers of the La Costa phenomenon and organized crime agree that the DRAM group selected San Diego—and particularly its undeveloped northern area—because there was no established syndicate sphere of influence, and the local press was supportive of Smith rule.

The La Costa-Teamsters-Smith relationship was rarely advertised. San Diegans were unaware that their "Man of the Century" was part of an unholy alliance. But as early as 1967 a massive report prepared confidentially for the California Department of Corporations and the State Attorney General's Office began to tie together various groups active in northern San Diego large-scale real-estate transactions and financial manipulations. The report made note of the "efficient organization and communication between various factions making up the total of organized crime."

In addition to the La Costa group, the report also focused on the Baptist Foundation of America. This church organization had close ties to the La Costa-Teamster clique. It was a combine of ministers, fast-buck artists, and gangsters who purchased land around northern San Diego County with phony collateral, creating what was to become a $26-million stock fraud.

The greening of La Costa's arid grazing land was costly; but unlike most investors and developers, the La Costa crew had extraordinary resources. Trustees of the Teamsters Central States Pension Fund sit on La Costa's board, and over $50 million in Teamster funds have gone into the work.

Half a million Teamsters members are covered by the Central, Southeast, and Southwest Areas Pension Fund. Unlike the Teamsters' Western Conference fund—which has its assets managed by the Prudential Life Insurance Company as a part of its general investment portfolio—the Central States Fund is handled directly by union officials and handpicked employer representatives. Over $5 million pours into the Chicago head office weekly. With over $1.5 billion in assets, it is the largest private cache of its kind.

The late Irvin J. Kahn, an attorney turned developer, was the largest recipient of Teamsters loans. Over $185 million went to his purchase of some sixty square miles of San Diego real estate just south of La Costa. Kahn's unlimited line of credit with the Pension Fund was due to the good offices of St. Louis attorney Morris Shenker, who was Jimmy Hoffa's chief attorney. Shenker inherited most of Kahn's properties after his sudden death in September 1973.

Shenker, who has recently been under investigation by a federal strike force and grand jury in St. Louis, has emerged as a top financial arranger. His Byzantine financial maneuvering astounds investigators in and out of government. He first came to national attention twenty-five years ago during the Kefauver hearings. Twenty years later, his mob ties were detailed in a *Life* magazine exposé of former St. Louis Mayor A. J. Cervantes. (Shenker had got himself appointed to the St. Louis crime commission!) Since then, Shenker has shifted headquarters to his Dunes hotel and casino in Las Vegas. He visits San Diego often to oversee his country clubs, hotels, and land developments. He is a regular at high-level La Costa gatherings.

The Central Conference Fund has been involved in fraud and kickback scandals resulting in numerous indictments. All this hasn't bothered them one bit. As a private bank for its favorites, it has provided almost a billion dollars in preferred loans for luxury developments, vast real-estate tracts, slot-machine companies, and gambling casinos. Extensive investigation has uncovered scant evidence of any investments in cooperatives or low- or middle-income housing where rank-and-file Teamsters might reasonably expect to find shelter.

One of the many security-conscious conclaves at La Costa was a gathering on July 17, 1972, of Teamsters officials, organized-crime figures, and major Pension Fund recipients, among others. One of the participants was the son of Jimmy Hoffa, the former head of the union, who had been convicted of jury tampering and fraud involving the Teamsters Union Pension Fund.

It was at these meetings that the officials formally endorsed Nixon's reelection. Subsequent investigations have revealed that Allen Dorfman—the Pension Fund's "special consultant"—had already collected $1 million from Teamsters officials and organized-crime figures to donate to the Committee for the Reelection of the President in exchange for Hoffa's release and a "favorable" review of federal investigations into Teamsters officials and friends.

Dorfman lives in a luxury home next to La Costa's lush golf course; in between indictments for kickbacks and fraud involving Fund money, plus a nine-month stint in prison, Dorfman played a prominent role at Teamsters conclaves.

He inherited his interest in the pension fund from his late father, Paul "Red" Dorfman, who was one of the founders. Before his latest indictment for defrauding the fund (February 1974), Dorfman's control was complete. In the words of one insider, "He believes he's immune to everything. His power and authority were about as total as you can get."

Legal guidance for La Costa comes from John Andrew Donnelley, a leading San Diego attorney and power broker. In the late Forties, Donnelley had gone to Las Vegas with a client, Wilbur Clark, to help arrange construction of the Desert Inn.

In San Diego, Donnelley became an increasingly important functionary in the Smith machine. In Las Vegas he became chief counsel to the DRAM group. He is credited by some with saving Dalitz and his whole Las Vegas operation from ruin during the Guterma stock-fraud debacle. When Allard Roen, then the Desert Inn's executive director, was forced to plead guilty to fraud in that case, Donnelley took his place.

As a top-notch attorney, his services were invaluable during the intricate legal and financial maneuvering. Federal Tax Court proceedings in 1964 revealed that during the 1950's Donnelley was a key arranger of a series of transactions which the court concluded were "a sort of 'Tinker to Evers to Chance' "—in other words, something on the order of a preconcerted and well-coordinated triple play.

Donnelley covered all bases, representing or owning the Martinolich Shipbuilding Company, Refrigerated Transport Co., and National Steel and Shipbuilding and pushing a variety of purchases, loans, slot-machine deals, and construction projects.

The other owners involved included Wilbur Clark, Moe Dalitz, and Arnholt Smith. While the matrix of deals and loans involving hundreds of thousands of dollars never resulted in criminal charges, they spurred further federal probes into Dalitz's income tax returns.

More importantly, these early deals provide the first evidence of Donnelley's future role in arranging the move to San Diego and as key power broker in the group's internal affairs.

When DRAM began buying up northern San Diego County real estate in 1962, Donnelley helped them set up a string of corporate fronts—Planet, Inc., Star Investment, and the Bagshaw Corporation—with which to take legal title to the initial 2,000 acres.

Donnelley helped coordinate the flow of Teamsters cash into San Diego real estate. His law office has handled over $250 million in Teamsters land investments, and he has admitted in an interview that the various parties he represented were on "friendly" terms.

In 1970, the first crack in the Smith empire appeared—the indictment of John Alessio for over $1 million in tax evasion. Alessio had been transporting large unreported sums of cash in steel drums to San Diego to pay for the renovation of his Hotel Del Coronado (the set for the film *Some Like It Hot*). His three-year jail term was eased by frequent vacations outside the federal prison at Lompoc, California.

Alessio's troubles pale before the onslaught that finally overtook Smith in 1973. While his political protector and longtime associate Richard Nixon was harnstrung by daily Watergate revelations, the SEC, the IRS, and the Federal Deposit Insurance Company closed in. In addition, the Justice Department's Organized Crime Section began to investigate Smith's ties to the mob.

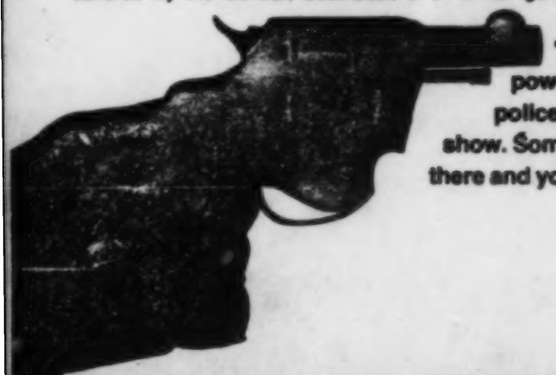
All of these complicated interrelationships came together in the matter of La Costa's use of the U.S. National Bank for its business accounts and for the banking of its pension-fund loans.

On October 15, 1973, Lew Lipton, an officer of the bank and an emissary from Smith, was in Miami, meeting with Teamsters boss Frank Fitzsimmons and trying to get additional Teamsters deposits for Smith's projects. He was shaken when Fitzsimmons waved a copy of the *Miami Herald* announcing one of the largest bank failures in U.S. history. It was the USNB.

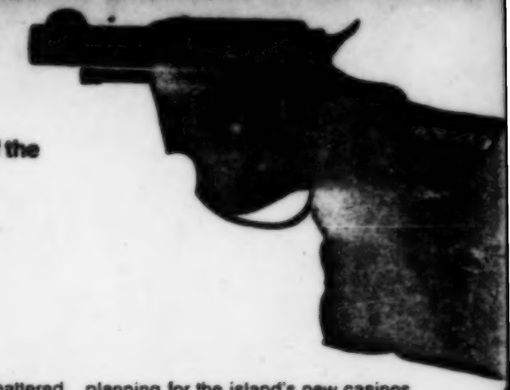
The Federal Deposit Insurance Corporation, which took control of the collapsed bank and which sued Smith and other officers for $410 million in damages, has refused comment on questions relating to the amount of Teamsters money that was on deposit. (The bank's assets merged into the Crocker Bank, which guaranteed deposits on account.)

On July 2, 1974, after a ten-month investigation, a federal grand jury in San Diego returned a twenty-five-count indictment against Smith for secretly funnelling $170 million from his U.S. National Bank. The complex conspiracy alleged in the indictment—there were 165 overt acts—was part of a scheme dubbed the Monster Project by Smith and his closest aides.

To bring the monster down, it had taken all the diligence of the press, the atmosphere of Watergate, and the hard work of those whom Smith called "government bureaucrats out to get me."



" 'These people are really powerful,' said one California policeman. 'They run their own show. Someone could get killed out there and you would never know it.' "



"Many people suspect that the government's inadequate investigation of La Costa is a reflection of the group's political power."

But Smith's arrogance was not shattered. Even after the SEC action (May 31, 1973) forced him to report all large-scale transactions, documents indicate that he continued his wheeling and dealing. And, according to sources with firsthand knowledge, one of his close associates began making overtures to an important government witness against Smith right after his indictment.

THE LANSKY CONNECTION

One important name has been omitted from the La Costa story. Meyer Lansky, the dark eminence of organized crime and the financial brain of Lucky Luciano's original organization, has a long-standing relationship to La Costa. Some even trace La Costa's origins to a trip he made to Alessio's Tijuana racetrack fifteen years ago. Traveling by limousine down the old highway—El Camino Real—Lansky happened on the area. Already familiar with the high-profit marinas and waterways of Miami, he saw its possibilities. The legal and illegal profits of the mob's worldwide operations needed more outlets. Soon after, Lansky's allies were sizing up real estate and laying plans for future development. Five years later, La Costa Country Club opened its doors.

Whether he gave an order or a recommendation is unknown. When *Penthouse* attempted to reach him through his attorney, E. David Rosen, he was unimpressed with this desire to reconstruct history. "I advise you not to try and contact my client," said Rosen.

For forty-five years, Lansky has had a harmonious relationship with La Costa's Moe Dalitz. While Dalitz and his group paid close attention to Las Vegas and the West Coast, Lansky was busy in Florida, Cuba, and the Bahamas. Each in turn cut the other in on "skim," laundering techniques, and new investment opportunities. While Lansky ruled the Havana gambling scene during the reign of dictator Fulgencio Batista, his Cleveland friends were cut in on his Hotel Nacional de Cuba.

After Castro closed the gambling factories of Havana, Lansky's group moved to the Bahamas. By 1967, a Royal Commission of Inquiry was digging deep into the financial operations of the Grand Bahama Development Corporation. The deft hand of Lansky appeared in behind-the-scenes planning for the island's new casinos.

Lansky, who generally stayed behind the scenes, worked through Wallace Groves, an experienced financial operator. When the heat increased in the Bahamas, Groves took advantage of La Costa's hospitality, commemorated in a 1968 directive from La Costa official Ben Vitale to the resort's employees:

> Mr. and Mrs. Wallace Groves will be arriving here as a guest of La Costa and Mr. Herman Perl. . . . The principal partners at La Costa are delighted that Mr. Groves is visiting with us. We wish to extend every courtesy and compliment to Mr. Groves and his family to make their stay here a pleasurable and memorable one.

Perl, Vitale, and Groves have all been principals in the Grand Bahama Development Company, now known as Devco. Perl, a mastermind of Bahamas resort sales, had been brought to La Costa to increase profits for the DRAM group.

Lining up the ever-helpful Arnholt Smith's USNB as a prime lender, they moved into condominium development. La Costa became a new city built around the owner's plush real-estate area.

Within the last few years, Groves and Vitale have shifted their California base to Stallion Springs, a resort in the Tehachapi Mountains north of Bakersfield. Similar to La Costa in design, Stallion Springs is owned by Devco, which is now controlled by Groves and his wife.

On January 19, 1970, Lansky reportedly flew in to La Costa accompanied by some superstar swingers of the sports world. Between rounds of golf, Lansky attended meetings with Teamsters Pension Fund controllers and his old friend Moe Dalitz.

Weeks later, he went south to a new and even more exclusive mob retreat in Acapulco, Mexico. After huddling in Acapulco with a variety of old cronies and representatives of the Canadian mob, Lansky managed to elude intelligence agents of three countries. Six months later, the Illinois Bureau of Investigation, examining a small Acapulco hotel called The Towers, discovered that Meyer had used it as a hideaway to lose his pursuers. The Towers, a plush preserve, was owned at that time by La Costa members.

The leadership of La Costa has demon-

strated an uncanny ability to grow and survive. Their financial reserves tower over those of rival business groups. Their legal and financial advisers consistently stay one step ahead of law-enforcement investigators, and inquiring citizens are left in the dark as to the real story.

It wasn't until November 30, 1974, in an ABC network news report on Jimmy Hoffa, that La Costa received any unfavorable publicity before a large audience. Ironically, a Los Angeles affiliate of ABC—a network which has aired numerous sports specials from La Costa—mysteriously canceled an earlier investigative report on the resort and its owners.

When anything threatens La Costa, the heavy artillery—money—is rolled out. The technique is Meyer Lansky's legacy to his associates; he has had a lifetime of experience in the laying out of whatever it takes to remain undisturbed.

An example of how La Costa avoids unnecessary trouble is contained in a federal intelligence report on a meeting held there in July 1972. Teamsters executives and various cronies, advisers, and borrowers descended on La Costa to discuss, among other things, protection. A decision was made to annex La Costa to the tiny coastal town of Carlsbad-by-the-Sea. A new San Diego district attorney hostile to Smith rule had been elected after a series of massive bribery scandals in local government. According to the federal law-enforcement report, "It is believed that the real reason for having this annexation take place is that surveillance by the San Diego Sheriff's office will [now] be restricted." In November 1972, the citizens of Carlsbad voted 41 to 39 to annex La Costa, thereby removing the resort from county jurisdiction.

The financial and political clout of the La Costa group generates a certain powerless feeling and even a fear within the local community. Nearby residents and businessmen speak of "their endless supply of money." A local police officer commented to *Penthouse*, "I used to be assigned to La Costa. I sure was glad when I was transferred. These people are really powerful. They run their own show. Someone could get killed out there and you would never know."

Law enforcement on the state level hasn't been very effective, either. Consider what happened in the late 1960's when the California attorney general's office showed signs of following up criminal activity.

In 1967, the California Department of Corporations report was being prepared. State agents were active in closing down the Baptist Foundation of America security fraud. Well-known mob figures began to have trouble. Jimmy "the Weasel" Fratianno, an infamous hit man, found his movements closely watched. Alessio and his brothers were under constant surveillance. Smith's name began to crop up in more and more intelligence reports. One named his bank as a major supplier of loan money to mob-operated bars and restaurants.

With the election of 1970, all this came to an end. Evelle J. Younger became the new attorney general. After a tumultuous term as district attorney of Los Angeles, Younger had gained a reputation as a "law and order" man. A consummate opportunist in the Nixon tradition, he soon made it perfectly clear who he thought were the enemies of the people.

Under Younger's leadership, the "yellow peril" took the heat off organized crime in California. His office issued reports and he himself made a straight-faced proclamation that so-called "Chinese youth gangs" represented the newest and greatest threat. The supporting cast in Younger's scenario included Hell's Angels and a wide variety of "militants."

In an interview with *Penthouse* and Katy Butler, a reporter for the San Francisco *Bay Guardian*, Younger could not remember the Baptist Foundation case (a $26-million fraud) or any State investigations of John Alessio and C. Arnholt Smith. This memory lapse becomes understandable after examining the sources of contributions made in support of Younger's campaign during the 1970 election.

First, there was over $45,000 from Conrad Arnholt Smith. Most of it was officially designated as loans from Smith, his daughter, and Smith's political adviser, Frank Thornton. The loans were never repaid, a fact which should have been of some concern to an attorney general. Smith was Younger's largest contributor, because unrepaid loans of this type are actually contributions and have to be reported as such. Said the attorney general: "Mr. Smith and Mr. Thornton apparently borrowed from themselves and spent it with Barnes-Champ [Smith's advertising agency], and I know very little more than that about it."

The repeated failures of state and local law-enforcement agencies suggest that the only apparatus capable of taking on such a complex, sophisticated, multijurisdictional phenomenon is the federal government. But knowledgeable law-enforcement officials are frustrated over the fact that investigations have been miserably inadequate, despite the existence of eighteen strike forces around the country, staffed with specialists from various government agencies (IRS, FBI, SEC, Post Office, etc.) and directed by capable Justice Department attorneys.

Many suspect that the government's lack of commitment is a reflection of the La Costa group's political power. A high official within a Justice Department organized-crime strike force remarked to *Penthouse*, "They're too smart for us. We'll never put them away."

Because of the complicated financial matters involved, the agency best equipped to deal with the problem is the Intelligence Division of the IRS. As for the Federal Bureau of Investigation—which has four times as many special agents as IRS Intelligence, as well as more criminal jurisdiction and investigative latitude—it has failed historically to combat organized crime.

Rumors that La Costa was to be sold to Japanese interests for $200 million have circulated regularly in the last few years. *Penthouse* has been able to document the fact that discussions have taken place between representatives of La Costa and certain Japanese investors, but except for the purchase of a small parcel of land in the industrial park, nothing firm has emerged from those discussions.

La Costa sales representatives are quick to deny these rumors. Said one official, "This whole package is too complex to sell, and besides we're the only ones who know how to run the place. Even if we sold out to the Japanese, we'd have to stay around for a couple of years to manage the operation."

Whether La Costa is sold or not is a mere detail. It is only a place. If the mob and its friends in business and government fly from La Costa, they will find some new nest.

CRIME AND CORRUPTION

La Costa's image as a posh resort camouflages its strategic importance to big crime. Camouflage is essential to crime, as labor organizations are transformed into company unions and private fiefdoms through racketeering; politicians swallow the intoxications of wealth, never questioning its sources; and a paper-hungry economy is unable to stop the flood of fraudulent transactions.

The record of C. Arnholt Smith is a classic example. Smith's political "influence"—corrupting politicians and bureaucrats—allowed him to amass a fortune while avoiding regulation of any kind. His final Monster Project nearly destroyed the tuna industry on the West Coast, taxi fleets in thirteen cities, and the livelihoods of thousands of farm and office workers. In addition, two major banks which incurred losses as creditors of Smith's fallen bank—Franklin National and Germany's Bank Herstatt—suffered economic ruin themselves.

The wave of financial corruption and securities fraud is so widespread that major banks are afraid to examine the paper (securities, etc.) they hold as collateral. The reason, according to a Senate probe, was the fear that unknown billions in "assets" would prove to be stolen or counterfeit.

The irresistible nature of crime and corruption permeates society. Over a dozen top corporations and their executives have pleaded guilty to illegal campaign contributions related to Watergate. Nine of the nation's major oil companies were involved in jointly bribing public officials. The country's largest railroad, Penn Central, went bankrupt as a result of a series of fraudulent transactions and investments.

Alliances between crime and wealth are an American tradition. With so much crime at the top, it is hardly surprising that many people see corruption as our dominant characteristic. The La Costa playground is a power center for the organization and proliferation of that corruption. ○+—■

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